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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES

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BARRICK GOLD EXPLORATION, INCORPORATED, et al.

*Petitioners,*

*v.*

MARTY D. HUDSON, *et al.*

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**

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May 24, 1995

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## EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment to the United States Constitution truly provides any substantive protection from legislation, such as the Coal Industry Retiree Health Benefit Act of 1992, P.L. 102-486, 26 U.S.C. Section 9701 *et seq.*, which is arbitrary and irrational as applied to the Petitioners.

## LIST OF PARTIES

Petitioners, Barrick Gold Exploration, Incorporated and Creighton Hills Coal Co., Inc., were appellants below. Gateway Coal Company and Maxus Energy Corporation also were appellants below, but are not joining in this Petition.

Barrick Gold Exploration, Incorporated is owned by Barrick Gold Mines, Ltd., which is owned by American Barrick Resources Corporation. Horsham Securities, Ltd. owns 22.2% of American Barrick Resources Corporation and The Horsham Corporation owns 100% of Horsham Securities, Ltd. The stock of American Barrick Resources Corporation and the Horsham Corporation are publicly traded. Creighton Hills Coal Co., Inc. is a privately held company.

Respondents, Marty D. Hudson, Michael H. Holland, Elliot A. Segal, Thomas O.S. Rand, Carlton R. Sickles, Gail Wilensky, and William P. Hobgood, as Trustees of the United Mine Workers of America Combined Benefit Fund,

Marty D. Hudson, Michael H. Holland, Thomas F. Connors, and Robert Wallace, as Trustees of the United Mine Workers of America 1992 Benefit Plan, and the United States of America, were appellees below.

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No. 95-

IN THE

*SUPREME COURT OF THE UNITED STATES*

October Term, 1995

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BARRICK GOLD EXPLORATION, INCORPORATED, et al.

***Petitioners,***

*v.*

MARTY D. HUDSON, et al.

***Respondents.***

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

---

Petitioners, Barrick Gold Exploration, Incorporated and Creighton Hills Coal Co., Inc., respectfully request that a Writ of Certiorari issue to review the Judgment and Opinion and the United States Court of Appeals for the Sixth

Circuit entered in the above entitled proceeding on February 24, 1995.

## OPINIONS BELOW

The Court of Appeals for the Sixth Circuit's Opinion is reported at 47 F.3d 832 (6th Cir. 1995), and reprinted in the Appendix ("App.") to this Petition at App-1. This Decision affirmed the District Court's Memorandum Opinion and Order granting judgment in favor of the Respondents which is reported at 823 F.Supp. 1395 (S.D. Ohio 1993), and reprinted at App-28.

## JURISDICTION

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court for the Southern District of Ohio on February 24, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Constitution of the United States of America, Amendment 5

**Criminal actions - Provisions concerning - Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Energy Policy Act of 1992, P.L. 102-486
## Subtitle C - Health Care of Coal Miners

**Sec. 19141. Short Title.** This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992."

**Sec. 19142. Findings and Declaration of Policy.**

(a) **Findings**. - The Congress finds that -

(1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and

(2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

(b) **Statement of Policy** - It is the policy of this subtitle -

(1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;

(2) to allow for sufficient operating assets for such plans; and

(3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

**Sec. 19143. Coal Industry Retiree Health Benefit Program**

(a) **In General**. - The Internal Revenue Code of 1986 is amended by adding at the end the following new Subtitle: Subtitle J - Coal Industry Health Benefits

**Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. Section 9701 *et seq.***

**Sec. 9702. Establishment of the United Mine Workers of America Combined Benefit Fund.**

(a) **Establishment.**

(1) **In general.** As soon as practicable (but not later than 60 days) after the enactment date, the persons described in subsection (b) shall designate the individuals to serve as trustees. Such trustees shall create a new private plan to be known as the United Mine Workers of America Combined Benefit Fund.

(2) **Merger of retiree benefit plans.** As of February 1, 1993, the settlors of the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan shall cause such plans to be merged into the Combined Fund, and such merger shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement.

**Sec. 9711. Continued Obligations of Individual Employer Plans**

(a) **Coverage of Current Recipients.**

The last signatory operator of any individual who as of February 1, 1993, is receiving retiree health benefits from an individual employer plan maintained

pursuant to a 1978 or subsequent coal wage agreement shall continue to provide health benefits coverage to such individuals and the individual's eligible beneficiaries which is substantially the same as (and subject to all the limitations of) the coverage provided by such plan as of January 1, 1992. Such coverage shall continue to be provided for so long as the last signatory operator (and any related person) remains in business.

(b) **Coverage of Eligible Recipients.**

(1) **In general.** The last signatory operator of any individual who, as of February 1, 1993 is not receiving retiree health benefits under the individual employer plan maintained by the last signatory operator pursuant to a 1978 or subsequent coal wage agreement, but has met the age and service requirements for eligibility to receive benefits under such plan as of such date, shall, at such time as such individual becomes eligible to receive benefits under such plan, provide health benefits coverage to such individual and

the individual's eligible beneficiaries which is described in paragraph (2). This paragraph shall not apply to any individual who retired from the coal industry after September 30, 1994, or any eligible beneficiary of such individual.

(2) **Coverage.** Subject to the provisions of subsection (d), health benefits coverage is described in this paragraph if it is substantially the same as (and subject to all the limitations of) the coverage provided by the individual employer plan as of January 1, 1992. Such coverage shall continue for so long as the last signatory operator (and any related person) remains in business.

**Sec. 9712. Establishment and Coverage of the 1992 UMWA Benefit Plan.**

(a) **Creation of Plan.**

(1) **In general.** As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the

UMWA 1992 Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration, and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

* * * *

(d) **Guaranty of Benefits.**

(1) **In general.** All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each such operator, shall include:

(A) the payment of an annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

(C) the provision of security (in the form of a bond, letter of credit, or cash escrow) in an amount equal to a portion of the projected future costs to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium than is greater than the premium otherwise applicable.

* * * *

(4) **Joint and Several Liability.** A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

## STATEMENT OF THE CASE

Petitioners, Barrick Gold Exploration, Incorporated ("Barrick") and Creighton Hills Coal Co., ("Creighton") (collectively the "Companies"), are former operators of bituminous coal mines where the classified employees were represented for collective bargaining by the United Mine Workers of America ("UMWA"). The Companies were signatories to several successive National Bituminous Coal Wage Agreements ("NBCWAs") negotiated by the UMWA and the Bituminous Coal Operators' Association, Inc. ("BCOA"), a multi-employer bargaining association. Most

recently, the Companies were "me-too" signatories to the 1988 NBCWA, which was terminated effective 12:01 a.m. on February 2, 1993; however, Barrick and Creighton had permanently ceased all covered operations under the 1988 NBCWA by October of 1988 and March of 1992, respectively.

The NBCWAs contractually required the Companies to contribute to two multiemployer retiree benefit plans known as the United Mine Workers of America 1950 and 1974 Benefit Plans and Trusts ("1950 and 1974 Plans"). Contributions were based on the hours worked and tons of bituminous coal produced by their classified employees and, under certain circumstances, the tons of bituminous coal procured or acquired from other producers. When an NBCWA signatory permanently ceased covered operations, however, it permanently ceased to have an obligation to contribute to the 1950 and 1974 Plans. *Connors v. Barrick*

*Gold Exploration, Incorporated*, 745 F.Supp. 747 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991).

The NBCWAs since 1978 also contractually required NBCWA signatories to maintain "Individual Employer Plans" during the term of each such NBCWA which, among other things, provided health benefits to their own respective post-January 1, 1976 retirees and their eligible dependents ("UMWA Retirees"). This obligation ended when an employer's last NBCWA was terminated. Thereafter, that employer's UMWA Retirees were entitled to receive health benefits from the 1974 Plan. *See In Re: Chateaugay Corporation*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied.*, 502 U.S. 1093 (1992); *District 29, United Mine Workers of America v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *District 29, United Mine Workers of America v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *United Mine Workers of America v. Nobel*, 720 F.Supp. 1169 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1158 (3d

Cir. 1990), *cert. denied*, 499 U.S. 904 (1991); *Schiffano v. United Mine Workers of America 1974 Benefit Plan and Trust*, 655 F.Supp. 200 (N.D. W.Va. 1987); *Box v. Coalite, Inc.*, 643 F.Supp. 709 (N.D. Ala. 1986).

The 1988 NBCWA enhanced a signatory's foregoing obligations in one critical respect. For the first time, the 1988 NBCWA required a signatory that permanently ceased (for any reason) to have an obligation to contribute to the 1950 and 1974 Plans, to make an additional lump sum payment to each of those Plans. The lump sum payments, known as "contractual withdrawal liability," were patterned after the pension plan withdrawal liability imposed under the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. Section 1381 *et seq.*

Barrick and Creighton each paid substantial contractual withdrawal liability to the 1950 and 1974 Plans following their withdrawal from those Plans in October of

1988 and March of 1992, respectively. Specifically, Barrick paid $3,284,042.84 and Creighton paid $119,490.65.

The Companies, having fulfilled all of their contractual obligations under the 1988 NBCWA, including this new obligation to pay contractual withdrawal liability upon their withdrawal from the 1950 and 1974 Plans, reasonably anticipated that when their 1988 NBCWAs expired they would cease to have any obligation to provide health benefits to their UMWA Retirees, and that such Retirees would be entitled thereafter to receive benefits from the 1974 Plan; however, the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. Section 9701 *et seq.*, which was enacted on October 24, 1992, drastically upset these expectations.

The Coal Act supplanted the prior collective bargaining program of providing health benefits to retirees under the NBCWAs with a wholly new statutory program that revolutionized the provision of such benefits. Among

other things, the Coal Act merged the 1950 and 1974 Plans into a newly created plan known as the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), 26 U.S.C. Section 9702(a).[1]

The Coal Act also required all 1988 NBCWA signatories, including the Companies, to perpetually provide health benefits to the UMWA Retirees participating in their Individual Employer Plans as of February 1, 1993, the last day of the 1988 NBCWA, even though the 1988 NBCWA provided (and the Companies' reasonable expectations were) that their obligations in that regard would completely terminate on February 1, 1993. 26 U.S.C. Section 9711. The estimated annual cost of providing these benefits as of March, 1993 was $766,024.56 for Barrick and $5,456.04 for Creighton.

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[1] The Companies have no beneficiaries in the Combined Fund. Therefore, Coal Act obligations related to that Fund all not material herein.

Finally, the Coal Act required all 1988 NBCWA signatories, including the Companies, to contribute to another newly created plan known as the United Mine Workers of America 1992 Benefit Plan. These contributions include annual prefunding premiums, per beneficiary premiums, and the provision of certain security. 26 U.S.C. Section 9712(d).

Although the Companies' new statutory obligations under the Coal Act are identical to those of all other 1988 NBCWA signatories, fewer than three percent of the other 1988 NBCWA signatories had withdrawn for valuable consideration (contractual withdrawal liability) from the Plans that were supplanted by the Coal Act. Even fewer had withdrawn prior to the Coal Act's enactment.

Moreover, while the Coal Act did not expressly provide the Companies with any refund, credit, or offset for their unique payments of contractual withdrawal liability, it did not ignore that subject. To insure that the cessation of

the obligation to contribute to the 1950 and 1974 Plans that would occur when the 1950 and 1974 Plans were merged into the Combined Fund would not give rise to contractual withdrawal liability for those 1988 NBCWA signatories that had not yet withdrawn, the Coal Act expressly provided that the merger "shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement." 26 U.S.C. Section 9702(a)(2). Thus, while imposing burdens on those few 1988 NBCWA signatories (including the Companies) that had already withdrawn from the 1950 and 1974 Plans for valuable consideration prior to the Coal Act's enactment, but without any refund, offset, or credit for that consideration, the Coal Act simultaneously gave such a credit to over ninety-seven percent of the other 1988 NBCWA signatories by expressly insulating them from the very same contractual withdrawal liability.

The Companies, along with Gateway Coal Company ("Gateway") and Maxus Energy Corporation ("Maxus"), filed

a complaint and a motion for a preliminary injunction in the United States District Court for the Southern District of Ohio. The Companies claimed, among other things that, as applied to them, the Coal Act violated the Due Process Clause of the Fifth Amendment to the United States Constitution. Subject matter jurisdiction over this claim in the District Court arose under 28 U.S.C. Section 1331.

On June 15, 1993, the District Court entered judgment in favor of the Respondents. The Companies, as well as Gateway and Maxus, appealed to the Court of Appeals for the Sixth Circuit under 28 U.S.C. Section 1291. On February 24, 1994, the Court of Appeals affirmed the District Court.

## REASONS FOR GRANTING THE WRIT

### Preliminary Statement

This case presents an important question of federal law which has not been, but should be, settled by this Court. This Court long has stated that the Due Process Clause provides a substantive right to be free from economic legislation that is arbitrary and irrational. Although the Court has not found a violation of this right for almost six decades, Justice O'Connor recently has emphasized that, in the right circumstances, the Court would find that a Congressional enactment is arbitrary and irrational and therefore violates the Due Process Clause. *See Concrete Pipe and Products of California, Inc. v. Construction Laborers' Pension Trust for Southern California*, 113 S.Ct. 2264, 2292-93 (1993); *United States v. Carlton*, 114 S.Ct. 2018, 2024-26 (1994).

In contrast, Justices Scalia and Thomas have interpreted this Court's failure to find a substantive due process violation as a recognition that no such right exists. In

*Carlton*, 114 S.Ct. at 2027, Justice Scalia, joined by Justice Thomas, wrote that "[i]f I thought that 'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation . . . . I welcome the recognition that the Due Process Clause does not prevent retroactive taxes, since I believe that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process . . . ."

The Companies submit that the Court should review this case to answer the important question of whether the Due Process Clause truly provides a substantive right that is protected by the arbitrary and irrational standard. If the answer is yes, then the Coal Act, as applied to the Companies herein, is the type of case which Justice O'Connor and, presumably, a majority of the Court, would find violates that Due Process right.[2]

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[2]The Companies recognize that several Courts have rejected Constitutional challenges to the Coal Act in a

**Is Substantive Due Process**
**a Constitutional Right?**

The nominal standards for evaluating substantive due process claims are well settled. "[L]egislative acts adjusting the burdens and benefits of economic life come to the Court with the presumption of constitutionality and [the] burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Concrete Pipe*, 113 S.Ct. at 2287. "Provided that the retroactive application of a statute is supported by a

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variety of factual situations. *See In Re: Chateaugay Corporation*, ___ F.3d ___, 1995 WL 226252 (2d Cir. 1995); *Templeton Coal Company, Inc. v. Shalala*, ____ F.Supp. ____, 1995 WL 150439 (S.D. Ind. 1995); *Davon, Inc. v. Shalala*, No. TH 93-198-C-T/H (S.D. Ind. April 4, 1995); *Holland v. Keenan Trucking Co.*, (S.D. W.Va., March 15, 1995); *Blue Diamond Coal Co. v. Shalala*, 174 B.R. 722 (E.D. Tenn. 1994). *But see, Unity Real Estate v. Hudson*, No. No. 93-1802 (W.D. Pa., December 7 and January 11, 1995)(Recommended Decisions by Magistrate Judge Pesto). All of these cases, however, are distinguishable since they do not involve employers that withdrew from and paid contractual withdrawal liability to the 1950 and 1974 Plans prior to the Coal Act's enactment.

legitimate legislative purpose furthered by a rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 729 (1984). *See also Carlton*, 114 S.Ct. at 2023 (the "harsh and oppressive" standard for evaluating retroactive tax legislation under the Due Process Clause "'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy.")

Notwithstanding the Court's failure to find a substantive due process violation under this arbitrary and irrational standard for almost six decades, Justice O'Connor repeatedly has emphasized in concurring opinions that the Court has not eliminated the right and would find a violation in the appropriate circumstances. In *Concrete Pipe*, Justice O'Connor, citing her concurring opinion in *Connolly v. Pension*

*Benefit Guarantee Corporation*, 475 U.S. 211, 228-36 (1986),

stated as follows:

> In essence, my position is that the "imposition of this type of retroactive liability [under MPPAA] on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the expectation of benefits under the plan as the employer's responsibility."
>
> The Court does not hold otherwise . . . .
>
> . . . .
>
> . . . . I also note that the Court's opinion should not be read to imply that employers may be subjected to retroactive liability simply because "pension plans [have] long been subject to federal regulation. [Citation omitted.] Surely, the employer that joined a multiemployer plan before ERISA had been promulgated - before Congress made employers liable for unfunded benefits - might have a strong constitutional challenge to retroactive withdrawal liability. The issue is not presented here . . . . It remains to be resolved in a future case.

113 S.Ct. at 2292-93. Similarly, in *Carlton*, 114 S.Ct. at 2025-26, Justice O'Connor observed:

> But "the Court has never intimated that Congress possesses unlimited power to 'readjust rights and burdens . . . and upset otherwise settled expectations.'" [Citation omitted.] . . . . For example, a "wholly new tax" cannot be imposed retroactively . . . .
>
> . . . . A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions.

Nevertheless, the Court's long-standing reluctance to find a substantive due process violation has fueled suspicion that there is no such right. Justice Scalia, joined by Justice Thomas, recently observed in a concurring opinion in *Carlton*, 114 S.Ct. at 2026-27, that substantive due process "was an oxymoron," and "that the Due Process Clause guarantees *no* substantive rights, but only (as it says) process . . . ."

The Companies submit that the Court should settle this issue and decide whether, as Justices Scalia and Thomas assert, the Due Process Clause does not provide a substantive right, or whether, as Justice O'Connor claims (along with the Companies), there is such a right, and the Court's reluctance

to find a violation of that right means only that it has not yet had occasion to review a case evidencing such a violation.

**The Coal Act Violates the Companies' Substantive Due Process Rights.**

If there is a case in which a legislative enactment violates one's substantive Due Process rights, this is it. As applied to the Companies, the Coal Act imposes obligations in a manner which defies explanation and is arbitrary and irrational in the extreme.

The Companies, unlike over ninety-seven percent of the other 1988 NBCWA signatories that are similarly burdened by the Coal Act, terminated their mining operations and withdrew from the 1974 and 1950 Plans well before the Coal Act was enacted. The Companies also paid millions of dollars to those Plans as a result of these withdrawals, and did so at a time when it was well settled that the 1974 Plan would provide health benefits to their UMWA Retirees after the termination of their 1988

NBCWAs. The Coal Act, however, imposed a variety of burdens on the Companies which wholly deprived them of the benefits they were to receive from these pre-enactment withdrawals.

To make matters worse, the Coal Act did not provide them with a refund, credit, or offset for the consideration (contractual withdrawal liability) they paid for these pre-enactment withdrawals, but did effectively give a credit for that very same contractual withdrawal liability to the other 1988 NBCWA signatories that had not yet withdrawn. Under the 1988 NBCWA, contractual withdrawal liability arose when, *for any reason*, an employer permanently ceased to have an obligation to contribute to the 1950 and 1974 Plans. *Connors v. Barrick Gold Exploration, Incorporated, supra*. The 1988 NBCWA could not be terminated until after 11:59 p.m. on February 1, 1993. Therefore, the Coal Act's merger of the 1950 and 1974 Benefit Plans into the newly created Combined Fund on February 1, 1993, pursuant to 26 U.S.C.

Section 9702(a)(2), necessarily would have resulted in a permanent cessation of the still participating 1988 NBCWA signatories' obligation to contribute to those Plans. This, in turn, would have required the still participating 1988 NBCWA signatories to pay the very contractual withdrawal liability that the Companies already paid.

Nevertheless, Congress expressly prevented this contractual withdrawal liability from arising as to those 1988 NBCWA signatories. Section 9702(a)(2) of the Coal Act provided that the foregoing merger "shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement." By including this proviso, Congress effectively insured that over ninety-seven percent of the 1988 NBCWA signatories being burdened by the Coal Act would receive a credit for the very withdrawal liability the Companies (1) had paid prior to the Coal Act's enactment, and (2) for which they were not receiving a like refund, offset, or credit.

This Court has never sanctioned the imposition of statutory liability in a manner even remotely similar to that which the Coal Act imposed on the Companies. Unlike the enactments which were at issue in the key Supreme Court precedents relied upon by the Court of Appeals, namely, the Black Lung Benefits Act of 1972 ("BLA"), 30 U.S.C. Section 901, *et seq.*[3], and the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. Section 1381 *et seq.*,[4] the Coal Act imposed burdens on the Companies notwithstanding the fact that, prior to its enactment, they withdrew from and paid contractual withdrawal liability to the benefit plans the Act was

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[3] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[4] *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct. 2264 (1993); *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

supplanting. In contrast, the BLA did not require benefit payments from employers unless the employer operated a mine after a future date (June 30, 1973). *See* 30 U.S.C. Section 932(a); 20 C.F.R. Section 725.492(a)(2); *Elliot Coal Mining Company v. Director, Office of Workers Compensation Programs*, 17 F.3d 616, 621 n.3, (3d Cir. 1994). Likewise, MPPAA, which was passed in 1980, did not impose any liability on an employer that withdrew (without having tendered any termination payments to the plan) more than a few months prior to its enactment. *R.A. Gray & Co.*, 467 U.S. at 724. Even this limited retroactivity, which was later repealed, was based on a rational desire to prevent employers from withdrawing without any liability while the legislation was being considered. *Id.*

In this case, the Coal Act imposes its full range of burdens on the Companies notwithstanding their pre-enactment withdrawals and corresponding payments of

contractual withdrawal liability.[5] These unique facts significantly distinguish this case from those relied on by the Courts below.

In particular, the Companies' pre-Coal Act withdrawals from the 1950 and 1974 Plans and their correspondingly unique payments of contractual withdrawal liability preclude any credible assertion that there is "some basis in the employer's conduct that would make it rational to treat the employees' expectation of benefits under the plan as the employer's responsibility." *Concrete Pipe*, 113 S.Ct. at 2292 (O'Conner, concurring). Assuming, for purposes of

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[5] Although Creighton withdrew from the 1950 and 1974 Plans in March, 1992, only eight months prior to the Coal Act's enactment that is not sufficient to analogize this case to *R.A. Gray*. The relevant date under the Act for purposes of comparing this case to *R.A. Gray* is July 20, 1992. This is the pre-enactment date which is used to determine the corporate connections and affiliations used in deciding liability as a related party, is the date the Coal Act chose for use in preventing employers from avoiding its obligation while the legislation was pending. *See* 26 U.S.C. Section 9701(c)(2).

argument, that an NBCWA signatory's prior employment of UMWA miners under an NBCWA is a rational basis for generally treating the employees' expectations of benefits as the signatory employer's responsibility, the Companies' withdrawals for agreed upon consideration (payments of contractual withdrawal liability) significantly distinguish them from almost every other NBCWA signatory and eliminate any possibility that their employees reasonably continued to expect additional benefits from them.

Moreover, even if there is a rational basis for imposing the Coal Act's burdens on the Companies notwithstanding their pre-enactment withdrawals for consideration, there is no rational basis for doing so in this particular manner. Congress can upset settled expectations and impose burdens disproportionately so long as it has a rational basis for the choices it makes. Here, the choices were wholly arbitrary and irrational.

Imposing the Coal Act's obligations on the Companies without any refund, offset or credit for the consideration they paid (contractual withdrawal liability) to withdraw from the 1950 and 1974 Plans being supplanted by the Coal Act, while effectively extending a credit against that very same contractual withdrawal liability to over ninety-seven percent of the other 1988 NBCWA signatories, cannot be justified as a rational means of achieving any legitimate legislative objectives. Neither the Respondents nor the Lower Courts have been able to identify a *single* legislative objective that is rationally furthered by imposing burdens in this particular manner,[6] and none exists. If imposing burdens on all 1988

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[6] The Court of Appeals expressly avoided deciding this issue by concluding that the Companies were not directly contesting the Coal Act's burdens and, instead, were contesting only its failure to provide a refund, offset, or credit. From this premise, the Court of Appeals reasoned that it was not required to decide whether Congress' so-called failure to act was arbitrary or irrational. App. 18-21.

The Companies respectfully submit that the Court of Appeals misconstrued their assertions. First, the

NBCWA signatories without regard to their prior contractual obligations was an objective, then electing to protect over ninety-seven percent of those signatories from the very contractual withdrawal liability the Companies already paid is patently irrational. Likewise, if protecting the 1950 and 1974 Plans' assets prior to their merger into the Combined Fund was the objective, then releasing over ninety-seven percent of the 1988 NBCWA signatories from contractual withdrawal liability, which release resulted in a loss of over $350,000,000.00 for those Plans, is equally if not more

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Companies never acknowledged that Congress rationally imposed the Coal Act's burdens on them in the first instance. To the contrary, the Companies argued that Congress did not act rationally, and simply emphasized the absence of a refund, offset, or credit as an indicia of the Coal Act's extremely arbitrary and irrational impact on them. Second, if the Due Process Clause provides any substantive right to be free from arbitrary and irrational legislation, then Congress' actions, as well as its corresponding failure to act in the same legislation, logically both must meet that standard, and this Court has never held otherwise.

irrational. The simple truth is that this particular manner of imposing liability was wholly arbitrary as applied to the Companies.

**Summary**

Imposing the Coal Act's burdens on the Companies notwithstanding their prior withdrawal from and payments of contractual withdrawal liability to the very Plans that were supplanted by the Coal Act goes well beyond anything this Court has previously upheld under the Due Process Clause. If Justice O'Connor's concurring comments in *Connolly*, *Concrete Pipe*, and *Carlton* reflect the Court's view of substantive due process, the Coal Act, as applied to employers that, like the Companies, previously withdrew for substantial consideration from the 1950 and 1974 Plans being supplanted by the Coal Act, is arbitrary and irrational.

Moreover, even if these facts alone do not establish a violation of the Companies' substantive due process rights under the stringent arbitrary and irrational test, the line is

surely crossed when one appreciates that the Coal Act imposes these burdens without any corresponding refund, offset, or credit for the Companies' payments of contractual withdrawal liability, but simultaneously gives a such a credit against that very same contractual withdrawal liability to hundreds of other 1988 NBCWA signatories. This scheme simply defies common sense and is arbitrary and irrational in the extreme since it imposes burdens in a disproportionate manner without having any reasoned justification or serving any legitimate legislative purpose.

If, as the Court and, in particular, Justice O'Connor assert, the Due Process Clause provides a substantive check on Congress, then the Coal Act, as applied to the Companies, clearly violates the Companies' substantive due process rights.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BARRICK GOLD EXPLORATION, INCORPORATED, et al.

*Petitioners,*

*v.*

MARTY D. HUDSON, *et al.*

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**APPENDIX**

Recommended For Full-Text Publication
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0069P
(6th Cir.)
File Names: 95a0069p.06

No. 93-3783

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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|---|---|---|
| BARRICK GOLD EXPLORATION, INCORPORATED; GATEWAY COAL COMPANY; MAXUS ENERGY CORPORATION; and CREIGHTON HILLS COAL CO., INC., | ) | |
| *Plaintiffs-Appellants,* | ) | ON APPEAL |
| v. | ) | from the U.S. District Court for the Southern |
| MARTY D. HUDSON, *et al.,* | ) | District of Ohio |
| *Defendant-Appellee.* | ) | |

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Decided and Filed February 24, 1995

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Before: KEITH, NELSON, and SUHRHEINRICH, Circuit Judges

DAVID A. NELSON, Circuit Judge. We are presented in this appeal with a challenge to the constitutionality of the Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. §§9701, *et seq.* (the "Coal Act"), as applied to the plaintiff companies.[1]

The plaintiffs conducted coal mining operations over a number of years, and them or their predecessors bound themselves to a series of collective bargaining agreements, known as National Bituminous Coal Wage Agreements ("NBCWAs"), with the United Mine Workers of America. These agreements, the last of which was negotiated in 1988,

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[1] Plaintiff Maxus Energy Corp., formerly known as Diamond Shamrock Corp., is "related" to plaintiff Gateway Coal Co. within the meaning of 26 U.S.C. §9701(c)(2). Gateway, like each of the remaining plaintiffs, was a "signatory" coal mine operator within the meaning of 26 U.S.C. §9701(c)(1). For purposes of this opinion we shall treat Maxus and Gateway as a single plaintiff.

included provisions under which active and retired coal miners were to receive health care benefits.

During the period when the 1988 agreement was in force, each of the plaintiffs stopped conducting mining operations covered by the agreement. As a result the plaintiffs became obligated, under the terms of the agreement, to make "withdrawal" payments to two multiemployer benefit plan trust funds through which health benefits were provided to certain categories of retired UMW-represented coal miners.[2]

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[2] The Funds in question were known as the "1950 plan" and the "1974 plan." The former provided coverage mainly for UMW-represented miners who had retired before December 6, 1974. The latter provided coverage for other UMW-represented miners who did not have coverage under individual employer health benefit plans. The contractual withdrawal liability assessed against the plaintiff companies came to a total of $8,584.060. Most of this money went to the 1950 plan; the plaintiffs' total withdrawal liability payments to the 1974 plan came to approximately $845,800.

The Coal Act, which was signed into law prior to the expiration of the 1988 agreement, mandated the merger of the two multi-employer funds into a new Combined Fund as of February 1, 1993, the date on which the 1988 agreement was scheduled to expire. All signatories to the 1988 agreement, including the plaintiffs, were required by the Act to make payments covering a portion of the costs of the new fund during an eight month transition period. Coal mining companies with continuing operations were required to make annual premium payments to the new fund thereafter, and such companies could credit their "transition rule" payments against their annual premium obligations. No such credit was available to companies which, like the plaintiffs, had no annual premium obligations.

The 1978 NBCWA had imposed a general requirement that signatory companies establish and finance individual employer health benefit plans for their own post-1974 UMW retirees. The Coal Act required companies that

maintained such plans, including the plaintiffs, to continue providing health benefits to their individual plan retirees indefinitely. Companies that had incurred contractual withdrawal liability to the 1950 and 1974 multi-employer plans were not authorized to offset or credit such liability against the cost of providing continued individual employer plan coverage. Neither was any provision made for refunds of contractual withdrawal liability payments.

The plaintiff companies sued the trustees of the Combined Fund[3] for declaratory and injunctive relief. In an opinion and order reported at 823 F.Supp. 1395 (S.D. Ohio 1993), the district court (Graham, J.) granted judgment to the defendant trustees.

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[3] The trustees of the UMW benefit plan, known as the "1992 plan," were also sued, but the issues raised in connection with the 1992 plan have not been pressed on appeal.

The issues presented by the plaintiffs on appeal have been narrowed to these:

- Does the Coal Act violate the "substantive" component of the Due Process Clause[4] to the extent that it fails to grant the plaintiffs a refund, credit, or offset for (a) their contractual withdrawal liability payments, and (b) their transition rule payments?

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[4] Although the Due Process Clause might appear on its face to be concerned with the matters of "process," and not with matters of substance, the Supreme Court has long held that the clause has a substantive component as well as a procedural one. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *Railroad Retirement Bd. v. Alton Railroad Co.*, 295 U.S. 330 (1935); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992). Since the latter part of the 1930s the Supreme Court is widely thought to have been less than enthusiastic about invoking substantive due process to strike down economic legislation. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). The concept of substantive due process clearly remains viable in the Court's thinking today, however -- and under this concept courts may invalidate legislation that deprives persons of life, liberty, or property on a basis found to be arbitrary and irrational.

- Does the Coal Act violate the Takings Clause in these respects?

Under the current Supreme Court doctrine, we believe, both issues must be resolved against the plaintiff companies. The judgment of the district court will be affirmed.

I

In passing the Coal Act, Congress removed the subject of health benefits for current UMW retirees from the collective bargaining process and dealt with it legislatively instead. The circumstances that led to this decision are described in the district court's opinion, as are the general structure and mechanics of the Coal Act itself. *See* 823 F.Supp. 1398-1401. An understanding of these matters is important to a proper understanding of the case, but we shall not repeat here the exegesis ably presented in Judge Graham's opinion.

The plaintiff companies tell us that "the Coal Act imposes new and unprecedented obligations that could not reasonably have been imagined when the Companies became bound by the 1988 NBCWA . . . ." Reply Brief, p. 3. From a dollars and cents standpoint, it appears, the obligation that has the biggest impact on the plaintiffs is the one imposed by 26 U.S.C. §9711(a). This section provides, in substance, that "last signatory operators" who have been providing retiree health coverage under a collectively-bargained individual employer plan must continue to provide coverage thereunder regardless of any continuing contractual obligation.

The plaintiffs' estimated annual cost of providing such individual employer plan coverage comes to a total of $772,892.[5] Were it not for the Coal Act, the plaintiffs suggest, they could have terminated their individual plans

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[5] The plaintiffs' transition rule payments -- which, under 26 U.S.C. §9704(i)(1)(A), do not have to be repeated annually -- came to total of $152,007.

when the 1988 agreement ended in February of 1993. Retirees enrolled in the individual employer plans at that time would have been "orphaned, in effect, and presumably could have received health benefits under the 1974 mult-employer plan for as long as that plan continued in existence and remained solvent.

Notwithstanding the magnitude, novelty and alleged unforeseeability of the new obligations imposed by the Coal Act, the plaintiffs do not directly contend that Congress acted unconstitutionally in imposing these obligations. The plaintiffs' contention, rather, is that when the new obligations were imposed, Congress was constitutionally required to provide for a refund, credit, or offset in respect of any contractual withdrawal liability payments made to the multi-employer plans under the 1988 agreement, as well as providing for a refund, credit, or offset in respect of transition rule payments made by companies that had gone out of the coal business.

Not to provide such refunds, credits, or offsets, the plaintiffs argue, served no legitimate legislative purpose. It was irrational and arbitrary, they say, for Congress to give them no credit for payments of a sort that companies remaining in the business either did not have to make at all (the contractual withdrawal liability payments) or that such companies would be able to recoup down the road (the transition rule payments).

Fewer than three percent of the 933 employers that bound themselves to the 1988 agreement made contractual withdrawal liability payments to the multi-employer plans. But if the Coal Act had simply merged the plans into a new combined fund without more, the plaintiffs say, the 1988 agreement might arguably have been construed as requiring signatory companies to make withdrawal liability payments even if they had not gone out of the coal mining business. The Coal Act forestalled any argument along these lines by providing, at 26 U.S.C. §9702(a)(2), that the merger of the

multi-employer plans "shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement." The plaintiffs maintain that it was irrational to deny them credit for their contractual withdrawal liability payments when most other coal mining companies had made no such payments and were assured, under the statute, that they would not have to do so by reason of the merger.

As to the transition rule payments through which the resources of new Combined Fund were augmented during the fund's start-up period, the plaintiffs argue that Congress intended to imposed Combined Fund liability only on employers with retirees who were Combined Fund beneficiaries. None of the plaintiffs' retirees was a Combined Fund beneficiary. Therefore, the plaintiffs submit, it was irrational for Congress to deny the plaintiffs an opportunity to recoup their transition rule payments after the fund was up and running, when employers that did have beneficiaries in the fund -- and that thus were required to make ongoing

annual premium payments -- were entitled to have their transition rule payments credited against their annual premium obligations.

II

In *Railroad Retirement Bd. v. Alton Railroad Co.*, 295 U.S. 330 (1935), the Supreme Court struck down as unconstitutional a federal statute, the 1934 Railroad Retirement Act, that established a pension system funded, in part, by compulsory contributions from carriers regulated by the Interstate Commerce Commission. Former employees -- including some who had already retired -- were included in the scheme if they had been in the service of a regulated railroad within one year prior to passage of the statute. The result, as in the *Alton* Court observed, was that "[t]he statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of

either employer or employee that further sums must be provided by the carrier." *Id.* at 349.

The "former employee" provision and other challenged features of the statute were found to be non-severable, and the Court held that they rendered the act invalid under the Due Process Clause. *Id.* at 362. The Court went on to hold that the act was also bad because "it is not in purpose or effect a regulation of interstate commerce within the meaning of the Constitution." *Id.*[6]

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[6] Quoting this passage only, the defendant trustees assert that "[i]n deciding *Alton* the court relied on the commerce clause, not on the due process clause . . . ." Appellees' brief, p. 37. The trustees' assertion is a puzzling one. At the beginning of the very paragraph containing the quoted passage the Court declared flatly that "the Act is invalid because several of its inseparable provisions contravene the due process of law clause of the Fifth Amendment." Even the four justices who dissented agreed that it was "arbitrary," and thus beyond the power of Congress, to require carriers to provide retirement benefits for persons who had already left railroad service. *Id.* at 389. This reading of the *Alton* dissent is confirmed by *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19n.18 (1976).

If the case at bar had come before the *Alton* Court in 1935, the obligations imposed by the Coal Act might well have been held unconstitutional under the Due Process Clause regardless of the presence or absence of provisions authorizing refunds, credits, or offsets. This is not 1935, however, and more recent caselaw strongly suggests that the obligations imposed by the Coal Act are not unconstitutional.

> "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

Applying this deferential standard, the *Turner Elkhorn* Court upheld the constitutionality of a statutory requirement

that coal mine operators provide compensation for miners who had been disabled by black lung disease arising out of employment in mines for which the operators were responsible -- and provide such compensation regardless of whether the miners had left employment in the coal industry before the statute was passed.

Legislation readjusting rights and burdens does not violate the Due Process Clause "solely because it upsets otherwise settled expectations," *Turner Elkhorn* teaches, and "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Id.* at 16. It was not irrational for Congress to spread the burden as it did, the *Turner Elkhorn* Court went on to hold, because black lung disease had been "bred in the past" and the operators had profited in the past from the labor of those who became afflicted with the disease. *Id.* at 18, Judge Easterbrook has observed that in *Turner Elkhorn* the Supreme Court "said, as bluntly as a court ever does, that it was out of the business of

reviewing the wisdom of statutes" -- a proposition that Judge Easterbrook takes *cum grano salis*, of course. Easterbrook, "The Constitution of Business," 11 Geo. Mason U.L.Rev. 53 (1988).

Although the statute at issue in *Turner Elkhorn* involved compensation for illness or death, as opposed simply to meeting a "generalized need for funds" on the part of former employees, *Turner Elkhorn*, 428 U.S. at 19, no such distinguishing factor was present in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). the statute at issue in *Gray*, the Multiemployer Pension Plan Amendments Act of 1980, required an employer withdrawing from a multi-employer pension plan to pay a share of the plan's unfunded vested liabilities. A unanimous Supreme Court held that it was not unconstitutional, under the Due Process Clause, for Congress to make this new requirement retroactive to the time when the legislation had first been proposed. If a rational legislative purpose justifies a

Congressional decision to give a statute retroactive application, *Gray* declared, retroactive application meets the test of due process. *Id.* at 730.

In *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S.Ct. 2264 (1993), the Supreme Court upheld the same statute against several constitutional challenges -- including a substantive due process challenge -- not based on retroactivity. The employer in *Concrete Pipe* had withdrawn from a multi-employer pension plan at a time when, the employer asserted, none of its employees had acquired vested rights to benefits under the plan; consequently, the employer argued, to require it to bear any part of the plan's unfunded vested liability was irrational. In rejecting this argument the Court pointed to "the deferential standard of review applied in substantive due process challenges to economic legislation," under this "deferential" standard, the Court

declared "there is no need for mathematical precision in the fit between justification and means." *Id.* at 2288.

As the district court concluded in the case at bar, the requirement that the plaintiff companies made transition rule payments to the Combined Fund is analogous to the requirement, imposed by the statute upheld in *Gray* and *Concrete Pipe*, that companies withdrawing from multi-employer pension plans make payments to reduce the unfunded vested liabilities of the plans. 823 F.Supp. at 1402. The district court likewise concluded that Congress acted rationally in requiring the plaintiffs to continue providing benefits under their individual employer plans. *Id.* at 1405. The plaintiffs, as we have indicated, do not directly challenge either of these conclusions.

What the plaintiffs contend, rather, is that Congress acted irrationally in not providing for refunds, credits, or offsets. But if the newly imposed burdens are themselves rational, it is far from clear to us that a rational legislative

purpose need be shown for the failure of Congress to include other provisions designed to lighten the burdens. It is important to remember, in this connection, that the big-ticket expenditures for which the plaintiffs would like to receive credit -- the contractual withdrawal liability payments under the 1988 agreement -- were not mandated by the Coal Act at all. It would doubtless have been rational for Congress to have decided that employers should receive credit for such voluntarily-incurred obligations, but we would be taking on quite a task if we began analyzing the rationality of not including in a legislative enactment every provision that might rationally have been included.

The number of rational provisions that might conceivably have been added to the Coal Act to ameliorate the burden on the plaintiffs or other employers would appear to be limited only by the ingenuity of counsel. Must each omission be justified as rational? Must Congress, in other words, have a rational basis for failing to act? We doubt it.

"Not doing," as common law judges put is six or seven centuries ago, "is no trespass."

In the context of economic legislation, any other rule would be highly problematic. When imposing federal incomes taxes, for example, Congress may decide to allow a percentage depletion deduction for taxpayers engaged in mining activities -- but this does not mean that Congress must allow a corresponding deduction for taxpayers engaged in work of the mind. Failure to provide the latter deduction might be thought unfair -- mental resources are exhausted, over time, just as surely as physical resources are -- but the tax code does not violate due process merely because it is perceived to be unfair. "[T]he Constitution [does not] require that legislation on economic matters be compatible with sound economics or *even with normal fairness*." *Turner*

*Elkhorn*, 428 U.S. at 44 (Powell, J., concurring) (emphasis supplied).[7]

The Coal Act may be unwise or unfair in not providing the refunds, credits, or offsets that the plaintiff companies would have liked it to provide, but the Supreme Court continues to insist that "it is, by now, absolutely clear that the Due Process Clause does not empower the judiciary to sit as a superlegislature to weigh the wisdom of legislation." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (internal quotes and citations omitted). If we take the Court at its word, the plaintiffs' remedy lies not with the judicial branch, but with the legislative branch.

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[7] Neither does the Constitution require that legislation on economic matters be free of garden variety mistakes. If Congress did not really intend that companies with no retirees in the Combined Fund be permanently stuck with transition rule payments to that fund, it is up to Congress to correct its error.

The plaintiffs tell us that Daniel Rostenkowski, when he was a member of Congress, said that the House of Representatives had agreed to the Coal Act only reluctantly and intended to reconsider it "to discuss, for instance, why companies that had paid a withdrawal liability under the 1988 collective bargaining agreement should not be able to claim a credit for that payment against their new liability, rather than paying twice for the same retirees." Reply brief, p. 9, quoting 138 Cong. Rec. House H11408 (Daily Ed. Oct. 5, 1992). but as far as the largest new liability imposed on the plaintiffs by the Coal Act is concerned -- the liability for retirees enrolled in the plaintiffs' individual employer plans -- it is not entirely accurate to suggest that the plaintiffs' decision to go out of the coal business while the 1988 collective bargaining agreement was in force set the plaintiffs up to pay "twice for the same retirees." The retirees who are enrolled in the multi-employer plans to which the plaintiffs made contractual withdrawal liability payments are not the

same retirees for whom the Coal Act provides continuing coverage under the individual employer plans. The plaintiffs may have expected their individual plan retirees to be able to obtain coverage under the 1974 plan -- the cost of which coverage would have been significantly greater than the amount contributed to the 1974 plan by the plaintiffs in withdrawal liability payments -- but "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Concrete Pipe*, 113 S.Ct. at 2292, quoting *Turner Elkhorn*, 428 U.S. at 16.

Congresssman Rostenkowski evidently saw the issue of whether companies should be able to claim a credit for withdrawal liability payments as an issue for the legislature. In this he was surely correct. If the Coal Act is to be rewritten, it is Congress, not the courts, that will have to do the rewriting.

III

The plaintiffs' due process arguments having been rejected, "it would be surprising indeed to discover" that the challenged statute nonetheless violates the Takings Clause. *Connolly v. Pension Benefit Guarantee Appropriation*, 475 U.S. 211, 223 (1986); *Concrete Pipe*, 113 S.Ct. at 2289. In the light of *Connolly*, we discern no Takings Clause violation.

Connolly is yet another decision upholding the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980. The employer in that case had been a signatory to a pension plan trust agreement providing in so many words that the employer's obligation for pension benefits was ended when the employer made a specified contribution to the trust. *Connolly*, 475 U.S. at 218 and n.2. The employer made the specified contribution and withdrew from the plan, but the Amendments Act said that the employer would have to pay more than it had agreed to pay. A unanimous Supreme Court held that the imposition of this noncontractual liability -- a liability that reduced the

employer's net worth by nearly 25 percent -- did not violate the Takings Clause.

"[T]he United States has taken nothing for its own use," the *Connolly* Court said, "and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of pension trusts does not justify a holding that the provision violates the Taking Clause and is invalid on its face." *Id.* at 224.

The Supreme Court has developed no set formula for identifying a forbidden "taking," and has relied instead on "ad hoc, factual inquiries into the circumstances of each particular case." *Id.* The Court has, however, "identified three factors which have 'particular significance'" in this connection. *Id.* at 224-25. The three factors are as follows:

> "(1) 'The economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Id.* at 225, quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The *Connolly* Court's examination of the Multiemployer Pension Plan Amendments Act in light of these three factors "reenforce[d]" its "belief that the imposition of . . . liability does not constitute a compensable taking under the Fifth Amendment." *Connolly*, 475 U.S. at 225. We had no reason to suppose that, given the facts of the instant case, consideration of the same factors here would lead the Supreme Court to conclude that the Coal Act's imposition of the liabilities described in Part I of this opinion constituted a compensable taking of the plaintiffs' property. The plaintiffs do not contend otherwise; they simply argue

that the failure of Congress to provide for refunds, offsets or credits constituted a compensable taking. For the reasons already suggested, we do not find the argument persuasive.

**AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | |
|---|---|
| BARRICK GOLD EXPLORATION, INC., *et al.*, | ) |
| Plaintiffs, | ) |
| v. | ) Case No. C2-93-0104 |
| MARTY D. HUDSON, *et al.*, | ) Judge Graham |
| Defendants. | ) |

**MEMORANDUM OPINION AND ORDER**

Plaintiffs Barrick Gold Exploration, Inc. ("Barrick"), Gateway Coal Company ("Gateway"), Maxus Energy Corporation ("Maxus"), and Creighton Hills Coal Co. Inc. ("Creighton") challenge the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, §9701 *et seq.*, 106 Stat. 2776, 3036-3056 ("the Act"), codified at 26 U.S.C. §9701 *et seq.*, which was passed on October 24, 1992 as part of the Energy Policy Act of

1992. Barrick, Gateway and Creighton have ceased their coal mining operations but are subject to liability under the Act. Maxus is liable under the Act by virtue of Gateway's status as its subsidiary. Defendants are the trustees of two employee welfare benefit plans established pursuant to the Act. These plans are the intended recipients of payments plaintiffs are required to make under the Act. Plaintiffs request a declaratory judgment to the effect that the Act is unconstitutional as applied to them, and ask the Court to preliminarily and permanently enjoin the defendants from enforcing the Act against them.

Subsequent to the filing of the complaint, the United States of America sought leave to intervene pursuant to 28 U.S.C. §2403. Leave to intervene was granted on March 26, 1993. The Court conducted an oral hearing on plaintiffs' motion for a preliminary injunction on March 26, 1993. On April 21, 1993, the Court issued an order in which it proposed to consolidate the hearing on the motion for a

preliminary injunction with the trail on the merits, and offered the parties the opportunity to present additional evidence. Supplemental stipulations were filed on May 11, 1993. No other evidence being offered, the Court will view the record as complete.

Since at least 1950, the National Bituminous Coal Wage Agreements ("NBCWAs") between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators Association, Inc. ("BCOA"), a multi-employer association of coal producers have contained provisions for health care benefits for active and retired coal miners. Coal producers who were not members of the BCOA, like the present plaintiffs, have bound themselves to identical terms by signing so-called "me too" agreements. All producers who were parties to such agreements were required to make contributions to one or more UMWA trust funds in order to fund the pension and health benefits promised to the miners under the agreements. From 1950 to 1974, health and

pension benefits were provided through a single fund. In 1974, in response to the Employee Retirement Income Security Act of 1974 ("ERISA"), the fund was divided into four separate trusts, two for pensions and two for health benefits. The two health benefit trusts were the United Mine Workers of America 1950 Benefit Plan ("1950 Plan") and the United Mine Workers of America 1974 Benefit Plan ("1974 Plan"). The 1950 Plan provided coverage for miners who retired before December 6, 1974 or who retired between December 6, 1974 and January 1, 1976 and elected to be covered by the 1950 Plan. The 1974 Plan provided coverage for miners who retired after January 1, 1976 and elected to be covered by the 1974 Plan.

During the decade of the 1970's, a combination of demographic and economic factors adversely impacted the UMWA health benefit plans. These factors included a significant reduction in the amount of coal produced under the NBCWA's, the retirement of a whole generation of

miners and the rapid escalation of the cost of medical care. These problems led to the restructuring of the 1974 Plan in 1978. Under the 1978 NBCWA, each employer was given the responsibility for providing health benefits under the 1974 Plan for its own post-1974 retirees through individual employer plans established and financed by the employer. Each signatory was also obligated to make contributions to the 1974 Plan to finance benefits for post-1974 retirees whose last employer had gone out of business. The 1950 Plan continued to provide coverage for miners who retired prior to the implementation of the 1974 Plan. All signatory operators agreed to continue to fund both the 1950 and 1974 Plans and to establish individual plans as required by the 1978 agreement. The structure of the 1978 NBCWA was maintained, with minor changes, in all subsequent NBCWA's, including the 1988 NBCWA.

In the 1980's, the problems which plagued the Plans became more severe. As each successive NBCWA expired,

numerous employers left the coal business. Some employers successfully contended in the courts that their obligation to provide health benefits ceased with the expiration of the last NBCWA they signed, and that the 1974 Plan became responsible for their retirees' medical benefits. *See e.g., In Re Chateaugay Corp.*, 945 F.2d 1205 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 1167 (1992); *District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985); *United Mine Workers Int'l Union v. Nobel*, 720 F.Supp. 1169 (W.D. Pa. 1989), *aff'd without op.*, 902 F.2d 1158 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 1102 (1991). The responsibility for an increasing number of "orphan" retirees fell on a dwindling number of NBCWA operators. Meanwhile the cost of health care continued to escalate. By the late 1980's, these problems resulted in the inability of the 1950 and 1974 Plans to continue to provide health care benefits to UMWA retirees. This precipitated labor disputes and unrest in the nation's coal fields.

When collective bargaining failed to resolve an eleven month strike by the UMWA against the Pittston Coal Company, the Secretary of Labor intervened and facilitated a settlement which included provisions for the creation of the Secretary's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Commission") which was authorized to analyze the retiree health care crisis. The Commission submitted its findings and recommendations to the Secretary in November, 1990. *See* "Coal Commission Report: a Report to the Secretary of Labor and the American People" (Nov. 1990), Ex. A to Defendants' Memorandum Contra Plaintiffs' Motion for Preliminary Injunction, Doc. 11 (hereinafter "Report"). The Commission concluded that delivering and financing health care in the coal industry would require:

> the imposition of a statutory obligation to contribute on current and past signatories, mechanisms to prevent future dumping of retiree health care obligations, authority to utilize excess pension assets and the

> implementation of state-of-the-art manage care and cost containment techniques.

Report at 60. Following the Report, Congress understood its own study of the subject, and after two years of deliberations passed the Act. In so doing, Congress found:

> (1) the production, transportation, and use of coal substantially affects interstate and foreign commerce and the national public interest; and
>
> (2) in order to secure the stability of interstate commerce, it is necessary to modify the current private health care benefit plan structure for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

Act, § 9142(a)(1), (2), 106 Stat. at 3037. Congress further stated that the policy of the Act is:

> (1) to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry;
>
> (2) to allow for sufficient operating assets for such plans; and

> (3) to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

Act, §19142(b)(1)-(3), 106 Stat. at 3037.

The Act implements three methods of providing health care benefits to retirees beginning February 1, 1993. First, the Act provides for the merger of the 1950 Plan and the 1974 Plan into a fund known as the UMWA Combined Benefit Fund (the "Combined Fund"). 29 U.S.C. §9702. The class of beneficiaries entitled to receive benefits from this fund is limited to retirees who, as of July 20, 1992, were actually receiving benefits from the 1950 Plan or the 1974 Plan. 26 U.S.C. §9703(f).

All 1988 agreement operators are required to make contributions to the Combined Fund during the first eight months commencing February 1, 1993, in an amount sufficient to pay benefits and administrative costs incurred by the Combined Fund during those eight months. 26 U.S.C.

§9704(i)(1)(A). The amount of this contribution is reduced by the transfer of seventy million dollars from the 1950 Pension Plan pursuant to 26 U.S.C. §9705(a). All 1988 agreement operators are also obligated to make contributions to the Combined Fund from February 1, 1993 to September 30, 1994 in an amount sufficient to pay expenses of the 1950 Plan and the 1974 Plan which had accrued and remained unpaid by February 1, 1993, reduced by the assets of the Plans as of that date. 26 U.S.C. §9704(i)(1)(B). An additional obligation to pay annual premiums to the Combined Fund is imposed upon "assigned operators," that is, those operators who are assigned beneficiaries by the Secretary of HHS based upon the employment history of the retiree in relation to that operator pursuant to 26 U.S.C. §9706.

The second provision for benefits is found in 26 U.S.C. §9711. Under that section, last signatory operators who are required under the 1979 or a subsequent NBCWA

to provide benefits under an individual employer plan must now continue to provide such coverage to certain retirees. A "last signatory operator" is the signatory operator which is the most recent coal industry employer of a retirees. 26 U.S.C. §9701(c)(4). The class of eligible beneficiaries included within the scope of §9711 are: 1) retirees who, as of February 1, 1993, are receiving health benefits under the terms of an individual employer plan; and 2) individuals who have met the age and service requirements for eligibility for benefits under an individual plan as of February 1, 1993 and who retire on or before September 30, 1994. 26 U.S.C. §9711(a), (b).

Third, the Act establishes a new plan known as the 1992 UMWA Benefit Plan (the "1992 Plan"). The eligible beneficiaries under the 1992 Plan are: 1) those persons who, based on age and service as of February 1, 1993, would otherwise have been eligible for benefits from the 1950 Plan or the 1974 Plan were it not for the merger and July 20, 1992

cut-off date implemented by the Act; and 2) any person with respect to whom coverage under an individual employer plan is required pursuant to §9711 but is not provided by a last signatory employer or a related person 26 U.S.C. §9712(b)(2). The class of beneficiaries is further limited to individual who retire on or before September 30, 1994. *Id.* The Act requires that all 1988 last signatory operators pay an annual prefunding premium to the 1992 Plan based upon the number of beneficiaries or potential beneficiaries attributable to the operator. 26 U.S.C. §9712(d)(1)(A). All 1988 last signatory operators are required to provide future cost of providing benefits to beneficiaries or potentially eligible beneficiaries attributable to the operator. Finally, any last signatory operator is obligated to pay a monthly per beneficiary premium if a beneficiary attributable to it is currently receiving benefits from the 1992 Plan.

The Act does not address the provision of benefits to individuals who meet age and service requirements after

February 1, 1993 or who retire after September 30, 1994. The treatment of noncovered employees is left to future NBCWA's or congressional action. 26 U.S.C. 9711(e).

Barrick, Gateway, and Creighton operated mines under the 1988 and prior NBCWAs. Under the terms of those agreements, they contributed to the 1950 and 1974 Plans, even though they had no retired employees who were then entitled to receive benefits from those Plans. They also maintained individual employer plans which provided health care benefits to their active employees and any post-1974 retirees. Barrick, Gateway and Creighton have now permanently ceased covered operations and are not signatories to the current NBCWA they expected that their obligation to provide health benefits for their retirees would end on February 1, 1993, when the 1988 NBCWA expired, and that their retirees would then be covered under the 1974 Plan. Each has paid or expects to pay contractual withdrawal liability payments to the 1950 and 1974 Plans as

withdrawing employers pursuant to the terms of the 1988 NBCWA.

Plaintiffs claim that the Act, as applied to them, violates the Due Process Clause of the Fifth Amendment and the Takings Clause of the Fifth Amendment.

The standards for judging plaintiffs' due process claims are well settled. The Supreme Court stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976):

> It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955). 428 U.S., at 15.

Congress has wide latitude in making choices regarding economic legislation, and courts have reviewed economic legislation with great deference to the legislature's policies. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

Legislation takes property without due process of law only if it is arbitrary, discriminatory or demonstrably irrelevant to the policy of the legislature is free to adopt. *Nebbia v. New York*, 291 U.S. 501, 539 (1934). The statute will stand if a rational relationship exists between it and a legitimate governmental objective. *Id.* at 537; *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1021 (1st Cir. 1989) (legislation is reviewed to determine whether, in light of all the relevant surrounding circumstances, any reasonably conceivable set of facts could establish a rational relationship between the legislative act and the government's legitimate ends).

Legislation which has some retroactive effect does not for that reason alone violate the Due Process Clause. As the Court noted in *Usery*, 428 U.S. at 16:

> [O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *See Fleming v. Rhodes*, 331 U.S. 100 (1947); *Carpenter v. Wabash R. Co.*, 294

> U.S. 240 (1935); *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); *Louisville & Nashville R. Co. v. Mottley*, 219 U.S. 467 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. *See Lichter v. United States*, 334 U.S. 742 (1948); *Welch v. Henry*, 305 U.S. 134 (1938); *Funkhouser v. Preston Co.*, 290 U.S. 163 (1933).

The Supreme Court later commented in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 469 U.S. 717, 729 (1984):

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Plaintiffs claim that the Act is arbitrary and irrational as applied to them for the following reasons: 1) they are required to contribute to the Combined Fund, even though no beneficiaries of that Fund were employed by them; 2) they

are denied a refund of their contributions to the Combined Fund; and 3) they are required to continue individual plan benefits for their own retirees notwithstanding the fact that their contract liability to do so ended upon the expiration of the 1988 NBCWA and they made substantial payments to the 1950 Plan and the 1974 Plan for contractual withdrawal liability. The Court will examine each claim under the standards enunciated above.

Plaintiffs first argue that the contributions to the Combined Fund required under 26 U.S.C. §9704(i)(1)(A) and (B) constitutes an irrational liability as to them because they have no employees who are beneficiaries or potential beneficiaries of the Combined Fund. Although plaintiffs have no employees who are beneficiaries of the Combined Fund, they agreed, as signatories to the 1988 NBCWA and previous NBCWA's, to make contributions to the 1950 and 1974 Plans, even though they had no employees who were receiving benefits from those Plans. Plaintiffs participated in

and benefitted from a contractual system which promised benefits to the beneficiaries of the 1950 and 1974 Plans, which under the Act have been merged into the Combined Fund. Plaintiffs voluntarily participated in this system, which for decades had promised retired coal miners and their dependents lifetime health care benefits. *See* Report at 1; *District 29, United Mine Workers 1974 Benefit Plan & Trust*, 826 F.2d 280, 283 (4th Cir. 1987), *Nobel*, 720 F.Supp. at 1178. In order to obtain the benefit of union labor under the NBCWA's, plaintiffs understood responsibilities not only for their retirees but for others.

Under 26 U.S.C. §9704(i)(1)(A), plaintiffs are required to make contributions to the Combined Fund to cover benefits and administrative costs incurred by the Combined Fund during the first eight months. This payment is analogous to the withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1209, which required

an employer who withdraws from a multiemployer pension plan to pay a share of the plan's unfunded vested benefits. The Supreme Court upheld the constitutionality of the MPPAA, holding that the withdrawal liability provisions did not violate the Due Process Clause. *Pension Benefit Guaranty Corp.*, 467 U.S. at 728-734.

The Supreme Court recently addressed the MPPAA in *Concrete Pipe of California v. Laborers Pension Trust*, 1993 U.S. LEXIS 4053 (June 14, 1993). The Supreme Court held that the withdrawal liability imposed by the MPPAA did not violate due process as applied to an employer who had no employees who were vested in the pension plan at the time of the employer's withdrawal. The Court noted that due to the nature of multiemployer plans, an employer's contributions are never used solely for the benefits of its own employees, and that an employer often agrees to participate in a multiemployer plan in the hope that this will cost the employer less in the long run than it would to create a single-

employer plan, while at the same time accepting the risk that none of its employees will vest prior to the employer's withdrawal from the plan. *Id.* at 4066-4067.

In *Spring Branch Mining Co. v. UMWA 1950 Pension Trust & 1950 Pension Plan*, 691 F.Supp. 973 (S.D. W.Va. 1987), *aff'd*, 854 F.2d 37 (4th Cir. 1988), the court addressed the argument that the withdrawal liability imposed by the MPPAA violated the due process rights of operators who had no employees who were beneficiaries of the 1950 Pension Plan. The court noted the fact that the 1950 Pension Plan was funded through the contributions of all signatory operators, and that many of the beneficiaries were never employed by the companies bearing the funding burden. *Id.* at 986. The court concluded that in light of the nature of the 1950 Pension Plan, its history of instability, and the fact that the companies were obligated under the collective bargaining agreement to contribute to that plan, the MPPAA was a rational means to insure full-funding of vested benefits and

to discourage withdrawals by contributors, and was not irrational as applied to the plaintiff operators. *Id.* at 986-987.

A similar situation exists in regard to plaintiffs here. Plaintiffs were obligated under the NBCWA to contribute to the 1950 and 1974 Plans even though they have no employees who are beneficiaries or potential beneficiaries under those Plans. Thus, plaintiffs do have some prior connection to the payment of benefits to participants in the predecessors of the Combined Fund. The first-year cost provision is a rational means of assuring the adequate funding of benefits under the Combined Fund. This obligation extends only to the first eight months of the operation of the Combined Fund, and the burden imposed by this provision was reduced by the transfer of seventy million dollars from the 1950 Pension Trust. This provision is not irrational as applied to plaintiffs.

The same must be said of the contributions required under 26 U.S.C. §9704(i)(1)(B). That section requires 1988 signatory operators to make payments for a period of twenty months to the Combined Fund to cover the unpaid liabilities of the 1950 and 1974 Plans which accrued prior to February 1, 1993. Plaintiffs were signatories to the 1988 NBCWA, which expired on February 1, 1993. Plaintiffs were contractually obligated to make payments to the 1950 and 1974 Plan during that period. The effect of §9704(i)(1)(B) is to hold the 1988 operators liable for the deficits in those Plans which accrued prior to the expiration of the 1988 NBCWA and which were not adequately satisfied by the contributions made by the operators. It is rational and reasonable for Congress to hold the 1988 operators, including plaintiffs, responsible for these inadequately funded obligations which stem from a period when plaintiffs were signatories to the NBCWA and were contractually obligated to contribute toward these obligation.

Plaintiffs next argue that the Act violates their due process rights by failing to provide them with a refund of the first year cost contributions required under §9704(i)(1)(A), while assigned operators receive a credit for those contributions. the court will assume for purposes of this argument that plaintiffs will not be assigned beneficiaries under 26 U.S.C. §9706. Under 26 U.S.C. §9704(a), operators who are assigned beneficiaries must pay annual per beneficiary premiums to the Combined Fund. The amount of the premium is calculated to the Combined Fund. The amount of the premium is calculated to produce sufficient funds to cover the payment of health benefits and administrative costs attributable to the operator's assigned beneficiaries. 26 U.S.C. §9704(b). This premium must be paid for the plan year beginning February 1, 1993 (a period of eight months) and each successive plan year. *See* 26 U.S.C. §§9702(c), 9704(a). Under 26 U.S.C. §9704(i)(1)(D)(i), the premium of an assigned operator

under §9704(a) for the plan year beginning on February 1, 1993 is reduced by the amount of the first year cost contribution paid by that operator under §9704(i)(1)(A).

Congress realized that the process of assigning beneficiaries would take time, and wanted to insure that the Combined Fund was adequately funded during the period in which assigned operators were being identified. Congress chose to impose liability for the first eight months of the Fund's operations equally upon all 1988 signatories. The payment of the annual premium for the first year was postponed until October 1, 1993 to allow time for the assignment of beneficiaries. 26 U.S.C. §9704(g)(1). The first year annual premium covers the same expenses which are covered by the first year costs contribution, and would represent a double payment for the same costs. Thus, Congress allowed a credit toward the first annual premium for assigned operators to prevent this double liability. While operators who are assigned a large number of beneficiaries

might be responsible for a large premium and therefore ultimately pay more than other 1988 operators toward the first year costs of the Combined Fund, no assigned operator will pay less than an unassigned operator, since an assigned operator is still liable for the full amount of the first year contribution under §9704(i)(1)(A) even though that contribution may completely offset the additional liability for the first annual premium. Plaintiffs, as unassigned operators, are not liable for the first annual premium against which a credit for first-year cost payments is allowed. The failure to provide a refund of first year costs to plaintiffs does not result in them being held liable for more than assigned operators.

Plaintiffs argue that the Act's failure to grant them refunds of their contractual withdrawal liability payments is arbitrary and irrational. Plaintiffs indicate that they have paid or will pay withdrawal liability payments to the 1950 and 1974 Plans. They anticipated prior to the Act that their liability for providing health benefits would terminate upon

the expiration of the 1988 NBCWA, at which point their employees would have been covered by the 1974 Plan.

The Act now requires them to some extent to continue to cover their employees under their individual plans and it provides no refund or credit for their contractual withdrawal liability payments. Specifically, the Act requires plaintiffs to continue individual plan coverage to employees who were receiving benefits under an individual employer plan as of February 1, 1993, or who have met the age and service requirements for benefits as of February 1, 1993, and have retired on or before September 30, 1994. The Act, as discussed above, also requires first year costs and deficit reduction contributions to the Combined Fund.

Plaintiffs contractually agreed to be bound by the withdrawal liability provisions when they signed the 1988 NBCWA. The purpose of the contractual withdrawal liability provision was to deter withdrawals and to make employers liable at least to some degree for damages caused by their

withdrawal from the Plans. The contractual withdrawal liability imposed by the 1988 NBCWA represented only five years of contributions to the Plans, not the actual cost of funding lifetime health benefits for a withdrawing employer's retirees. *See* National Bituminous Coal Wage Agreement of 1988, Art. XX, Sec. (i)(3), Ex. B to Complaint. Indeed, a comparison of the cost of maintaining individual employer plans against the amount of the plaintiffs' withdrawal liability indicates that the withdrawal liability payments have no relation to the cost of providing lifetime retirement health benefits. *Id.* at 19.

Congress rationally found that the practice of operators withdrawing from the industry or otherwise terminating their obligation under the NBCWA, resulting in the transfer of their employees to the 1974 Plan, substantially contributed to the underfunding problems experienced by that Plan. These problems were not adequately addressed by the contractual withdrawal liability

payments required under the NBCWA. To some extent, plaintiffs did receive the benefits of the contractual withdrawal provision and will continue to do so under the Act. Plaintiffs ceased making contributions to the 1950 and 1974 Plans when they ceased mining operations. Although the Act does require some contributions to the Combined Fund, it does so for a limited period. Plaintiffs are required to maintain individual plans for some employees, but not for employees who meet age and service requirements after February 1, 1993 or who retire after September 24, 1994. Congress did not act irrationally in preserving the withdrawal liability provision in the NBCWA or in failing to provide for a refund of withdrawal liability payments.

Plaintiffs argue in general that the Act violates due process principles because it result in an unreasonable allocation of responsibility and constitutes an arbitrary and irrational imposition of liability. Plaintiffs claim that the Act is retroactive and for that reason is subject to closer scrutiny

under the Due Process Clause. The Act was passed on October 24, 1992 and became effective on February 1, 1993. The plaintiffs were signatories of the 1988 NBCWA which expired on February 1, 1993. The Act requires plaintiffs to continue to provide benefits which they were obligated to provide under the 1988 NBCWA and it requires them to make contributions to the successor to the 1950 and 1974 Plans to which they were required to contribute to under the 1988 NBCWA. A statute such as the Act which essentially preserves or extends existing contractual obligations is not retroactive.

Even if the Act is considered retroactive, its retroactive effects are justified by a rational legislative purpose, to wit, to impose the cost of retirees' medical care on those who promised it. Insofar as retroactivity is concerned, this case is not markedly different from the congressional decision to impose liability on coal mine operators for the consequences

of black lung disease. In upholding that legislation, the Supreme Court held:

> [T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.

*Usery*, 428 U.S. at 18. This Court can discern no rational difference between disabilities "bred in the past" arising from conditions of employment and legitimate expectations bred in the past arising from promises of employers. The Court notes that past promises of retirement benefits formed the rationale for the MPAA, which passed constitutional muster in both its prospective and retroactive applications. *See Pension Benefit Guaranty Corp.*, 467 U.S. at 728-734.

The Act is not irrational in terms of the liabilities imposed upon plaintiffs. While plaintiffs' view that they have no liability to fund health benefits after the expiration of the 1988 NBCWA has some support, a case recently decided by the District of Columbia Circuit Court of Appeals

raises new issues concerning the existence of continuing liability. In *UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993), the court upheld the trial court's interpretation of the so-called "evergreen clause" included in the trust agreements and incorporated by reference into the NBCWA. The clause construed as imposing a perpetual obligation on the part of the operators to contribute to the 1950 Pension Plan even after the NBCWA has expired and the operator is no longer a signatory to the current NBCWA. *Id.* at 473-475. A similar "evergreen clause" is found in the 1950 Plan and in Article XII of the 1974 Plan. It could be argued that plaintiffs would have been required under this clause to continue to contribute to the 1950 and 1974 Plans and to maintain their individual plans, as required under Article XX, Sections (b) and (c) of the 1988 NBCWA, even after the expiration of the 1988 NBCWA. The Act itself does not preclude enforcement of these "evergreen clauses" as they

relate to claims in existence as of February 1, 1993. *See* 26 U.S.C. §9708.

Even disregarding any possibility of continuing contractual liability, the Act as applied to plaintiffs does not violate due process. Plaintiffs were signatories to a series of collective bargaining agreements which promised lifetime health benefits to miners. The limited contributions for first year costs are a rational means of assuring the smooth transformation of the 1950 and 1974 Plans into the Combined Fund. This obligation was tempered by the transfer of funds from the 1950 Pension Plan. It is also rational to require plaintiffs to make contributions to meet the unpaid deficits of the 1950 and 1974 Plans, to which they were required to contribute under the 1988 NBCWA, those deficits having accrued prior to the expiration of the collective bargaining agreement.

Congress further acted rationally in assigning to plaintiffs the responsibility for funding benefits for their own

employees under their individual plans. Plaintiffs were obligated under the 1988 NBCWA to provide individual plan benefits to their own employees. Under §9711, plaintiffs are obligated to provide individual plan benefits only to those beneficiaries to which plaintiffs stand in the relationship of last signatory employer. Thus, this is not a situation where plaintiffs are required to provide benefits for nonemployees. This obligation was substantially tempered by limiting this responsibility to cases involving employees who had already retired and were receiving benefits as of the expiration of the 1988 NBCWA, or who had met the age and service requirements as of that time and retired within twenty months thereafter.

Under §9712, plaintiffs are required to pay annual prefunding premiums to the 1992 Plan based upon the number of beneficiaries or potential beneficiaries which are attributable to them as last signatory operators. Plaintiffs are also required to post security toward the payment of benefits

for potentially eligible beneficiaries. Any last employer of a beneficiary who is actually receiving benefits under the 1992 Plan is further obligated to pay monthly per beneficiary premiums.

The provision concerning the 1992 Plan are perhaps the most troublesome in terms of a due process analysis. Where an operator does not actually have any employee-beneficiaries who are receiving benefits under the 1992 Plan, its payments to the 1992 Plan are in the nature of an insurance premium against the possibility that the operator will later go out of business and cease to provide benefits to its employees. Where an operator fully complies with its obligation to provide coverage to beneficiaries under its individual plan, so that it never has any employees who become beneficiaries under the 1992 Plan, then the annual premium paid by that operator is used exclusively to fund benefits for the employees of other operators. If, however, an operator and any related person go out of business and no

entity remains to fund individual benefits, the eligible employees of that operator then receive benefits from the 1992 Plan. Unfortunately, it is impossible for the court to look into the future to see what, if any, false in the form of employee benefits any one operator will ultimately receive from these annual premiums.

Plaintiffs are also obligated to provide security in the form of a bond, letter of credit, or cash escrow, in an amount equal to "a portion" of the projected future cost to the 1992 Plan of providing benefits to the beneficiaries or potential beneficiaries to which plaintiffs stand in the relation of last signatory operator. Presumably, the percentage of this "portion" is a matter for the trustees of the 1992 Plan to decide. If, for example, an operator were required to post 99% of the projected cost of benefits as security, it would appear to result in the imposition of double liability to require that operator to pay an annual prefunding premium

as well. However, the amount which plaintiffs will be required to pose as security is not in evidence.

The court notes that last signatory operators, including pre-1988 last signatory operators, are required to contribute monthly premiums to the 1992 Plan where employees attributable to them are receiving benefits under the Plan. However, in light of the fact that beneficiaries become eligible for benefits under the 1991 Plan because they would otherwise have received benefits under the 1974 Plan or because their employer is not meeting its obligation to provide benefits under an individual plan for whatever reason, such as bankruptcy or going out of business, the court would anticipate that the monthly premiums might be hard to collect, and that the bulk of the funding for the 1992 Plan will come from the annual prefunding premiums paid by operators who are still in business.

The court concludes that the 1992 Plan does not violate plaintiffs' due process rights. It was not irrational for

Congress to require what in essence are insurance payments against the possibility of plaintiffs' going out of business in the future and relegating its employees to the 1992 Plan. The beneficiaries and potential beneficiaries of the Plan are plaintiffs' own employees and employees of other operators who, bur for the Act, would have been entitled to receive benefits under the 1974 Plan, to which plaintiffs had a duty to contribute under the 1988 NBCWA. The class of eligible beneficiaries of the 1992 Plan includes only individuals who had met age and service requirements prior to the expiration of the 1988 NBCWA, and who retire prior to September 30, 1994. The annual prefunding payment is calculated based upon the number of beneficiaries and potential beneficiaries who were last employed by plaintiffs. Presumably the amount of these premiums will decrease as the number of potential beneficiaries is reduced by death or by the subsequent employment of the beneficiary by some other operator in the coal industry. Further, it is not unreasonable

to require plaintiffs to provide some surety toward the satisfaction of their obligation to provide lifetime health benefits.

The Due Process Clause does not require that Congress legislate with exact precision in the economic realm. The requisites of due process are met when Congress devises a scheme that rationally spreads the cost of solving a problem among those responsible for creating it. The liabilities imposed upon plaintiffs are rationally related to plaintiffs' roles as employers and signatories of the 1988 NBCWA, and are reasonably structured to spread the cost of benefits. Whether a "broader cost spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery*, 428 U.S. at 19. The Act as applied to plaintiffs does not violate the Due Process Clause.

Plaintiffs also challenge the Act on the grounds that it appropriates their private property for public use without

compensation in violation of the Taking Clause of the Fifth Amendment. the Supreme Court has adopted a case-by-case approach to claims advanced under the Taking Clause, and the Court has identified certain factors as being of particular significance in the analysis. These are:

1. The economic impact of the regulation on the claimant;

2. The extent to which the regulation has interfered with distinct investment backed expectations; and

3. The character of the governmental action.

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

The Court addressed a Taking Clause argument in *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211 (1986), which involved a challenge to the MPPAA withdrawal liability provisions. The court noted that "it cannot be said that the Taking Clause is violated whenever

legislation requires one person to use his or her assets for the benefit of another." *Id.* at 223. The Court went on to note that legislation adjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, even though the legislation in effect imposes a new liability based on past acts. *Id.* The Supreme Court again applied the three factors identified above in the MPPAA context in *Concrete Pipe*, 1992 U.S. LEXIS at 4075-4082 and concluded that the MPPAA withdrawal liability did not constitute a taking in that case.

Under the benefit-funding provisions of the Act, the government does not take property for its own use, but rather "adjust the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225. Thus, the character of these provisions suggests that the Act's provisions do not constitute a taking mandating government compensation. Plaintiffs note that under 26 U.S.C. §9707, the Secretary of the Treasury may impose a penalty for the

failure on the part of an assigned operator to pay the premiums to the Combined Fund under §9707. Plaintiffs argue that this government involvement indicates a taking by the government. This penalty is in the nature of a tax. Under 26 U.S.C. §9707(f), the penalty is to be treated in the same manner as the tax imposed under 26 U.S.C. §4980B, which penalizes the failure of an employer to provide health insurance continuation coverage. The tax provisions in §4980B have been viewed as one method of enforcing the substantive obligation to provide continuation coverage. *See Johnson v. Reserve Life Ins. Co.*, 765 f.Supp. 1478 (C.D. Calif. 1991). Congress likewise sought to ensure compliance with the provisions of §9704(a) by providing for a tax as a penalty for failure to pay premiums. However, the court concludes that this in itself is not sufficient to convert the other provisions of the Act, which require that premiums or contributions be paid by the operators to the various health benefit plans, into a taking by the government. The court

further notes that since plaintiffs maintain that they will not be "assigned operators" so as to be liable for the payment of premiums under §9704, the penalty provided by §9707 would not apply to them and would never constitute a taking as to them.

Although the economic impact of the Act on the plaintiffs is no doubt significant, it is not severe when viewed in the total context of plaintiffs' past involvement in the coal industry. The nonrefundable interim contributions plaintiffs are required to make to the Combined Fund are as follows: Barrick, $3,457.44; Gateway, $141,959.65; Creighton, $6,590.60. While none of the plaintiffs have employees who will receive benefits from the Combined Fund, as noted earlier each of these plaintiffs assumed a degree of responsibility to the beneficiaries of the Combined Fund when, over a period ranging between eight and ten years, they participated in guaranteeing lifetime retirement health benefits to all coal miners who provided labor under the

NBCWAs. *Compare Spring Branch Mining Co.*, 691 F.Supp. at 982 (withdrawal liability under MPPAA did not violate the Taking Clause where operators contributed to the 1950 Pension Plan as required by the NBCWA even though they had no employees who were beneficiaries of the Plan). While they were operating, the contributions of Barrick and Gateway to the predecessors of the Combined Fund exceeded $5,000,000 each, whereas Creighton's contributions while operating under the 1988 NBCWA totaled almost $100,000. Although the plaintiffs are required to make an interim contribution to the Combined Fund, they are excused from further contributions to the Combined Fund even though a good case could be made for requiring them to pay a share of the liability for beneficiaries who cannot be assigned to a specific employer. Furthermore, under §9704(i)(1)(A), the amount of this contribution is reduced by funds transferred from the 1950 UMWA Pension Plan. Under these

circumstances, the Court cannot characterize the economic impact of the contributions to the Combined Fund as severe.

The Act requires each plaintiff to continue its individual employer plan for its own retirees who meet the age and service requirements by February 1, 1993 and who retire by September 30, 1994. As of the time the hearing on the motion for preliminary injunction, the monthly cost of doing so for each plaintiff was as follows: Barrick, $63,835.38; Gateway, $117,616.00; and Creighton, $454.67. Plaintiffs argue that this obligation is unreasonable in light of their obligation to pay contractual withdrawal liability under the 1988 NBCWA. However, plaintiffs promised each of their employees that they would have lifetime retirement medical benefits and presumably the monthly premiums they are now paying for such coverage is the fair and reasonable cost of performing that promise. Plaintiffs hoped to be able to transfer their retirees into the 1974 Plan in return for the following withdrawal liability payments to the 1974 Plan:

Barrick, $126,309.34; Gateway, $600,000.00; Creighton, $15,772.77. When those amounts are compared to the monthly cost of providing coverage for their employees, the total inadequacy of the withdrawal liability payments becomes apparent. Plaintiffs do retain the benefit of being excused from paying annual premiums to the Combined fund, and they are not liable for individual plan benefits for employees who retire after September 30, 1994. The Court cannot say that the economic impact of the failure to refund or credit plaintiffs' withdrawal liability is, in the total context, severe.

Under §9712(d)(1)(A), the plaintiffs are required to pay an annual prefunding premium to the 1992 Plan in the following amounts: Barrick, $4,756.00; Gateway, $29,520.00; and Creighton, $82.00. Presumably, this represents the reasonable cost of a plan which will ensure benefits for all retirees, including plaintiffs' retirees, who are now covered under individual employer plans, if their

employer defaults. The amount of the premium, which is based solely on the number of beneficiaries or potentially eligible beneficiaries attributable to plaintiffs, should decrease over time as the number of potentially eligible beneficiaries decreases. This is just another component of the cost of performing the promise of lifetime health benefits to retirees which plaintiffs made to their employees. Viewed in that context, the Court cannot say that the economic impact on the plaintiffs is severe.

The liabilities imposed by the Act cannot be said to be out of proportion to plaintiffs' experience with the benefit plans and the NBCWA. *Connolly*, 475 U.S. at 226. Further, the mere diminution in the value of property, however serious, which results from the liability imposed by the Act is insufficient to demonstrate a taking. *See Concrete Pipe*, 1993 U.S. LEXIS at 4079.

The Act clearly interferes with the plaintiffs' expectations regarding their obligation to pay for their

retirees' health benefits. Although they had promised lifetime health benefits for their retirees, they expected to discharge that obligation by assigning them to the 1974 Plan after they ceased their coal mining operations. However, in light of the problems which had afflicted the UMWA health benefit trusts for two decades, the extensive and long-term government regulation of the coal industry, Congress's involvement in solving the crisis in funding retirement pension when it enacted ERISA and the MPPAA and the fact that the Act was contemplated and discussed for two years prior to its passage, plaintiffs should have anticipated that Congress might enact legislation which would require them to shoulder all or part of the costs of fulfilling the promise of lifetime retirement health benefits for UMWA workers. Investment expectations which ignored this possibility would not be realistic and the Court concludes that the Act does not interfere with realistic investment backed expectations.

The Act does not violate the Takings Clause. Further, the Act as applied to plaintiffs does not violate the Due Process Clause. Plaintiffs' request for an injunction enjoining enforcement of the Act against them is denied. The clerk is directed to enter judgment for the defendants.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: June 15, 1993

Supreme Court, U.S.
FILED
JUL 26 1995
CLERK

(2)

No. 94-1938

# In the Supreme Court of the United States

OCTOBER TERM, 1995

BARRICK GOLD EXPLORATION, INC., ET AL.,
PETITIONERS

*v.*

MARTY D. HUDSON, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*, as applied to petitioners, violates the Due Process Clause of the Fifth Amendment.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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No. 94-1938

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 47 F.3d 832. The opinion of the district court (Pet. App. 28-75) is reported at 823 F. Supp. 1395.

### JURISDICTION

The judgment of the court of appeals was entered on February 24, 1995. The petition for a writ of certiorari was filed on May 25, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case involves a constitutional challenge to certain provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.* (Coal Act or Act). The United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of the Act.

1. The Coal Act was enacted in 1992 in response to a crisis in health care costs in the coal industry. A brief review of the industry's preexisting health benefits system is necessary to an understanding of the Act.

For more than 40 years, the United Mine Workers of America and bituminous coal mine operators have executed a series of national collective bargaining agreements known as National Bituminous Coal Wage Agreements (NBCWAs). Those agreements have governed the terms and conditions of employment in coal mines operated by members of the Bituminous Coal Operators Association (Association) and by "me too" operators, like petitioners, who were not members of the Association but who agreed to be bound by the terms of the agreements. Pet. App. 30.

Successive NBCWAs established a multi-employer benefit fund that provided lifetime health benefits for active and retired miners. The fund was financed by contributions from Association members and "me too" operators, based on tons of coal mined during the term of each agreement. In 1974, the original fund was divided into four separate multi-employer funds, two of which are involved in this case: the UMWA 1950 Benefit Plan and Trust ("1950 Plan") and the UMWA 1974 Benefit Plan and Trust ("1974 Plan"). The 1950 Plan provided health benefits to miners who

retired before January 1, 1976, and their dependents. The 1974 Plan provided health benefits to miners who retired on or after January 1, 1976, their dependents, and active miners. Pet. App. 30-31.

In 1978, the United Mine Workers and the Association established a new structure for funding retiree health benefits. The new structure was incorporated into successor NBCWAs, including the 1988 NBCWA, that petitioners signed. Under the new system, the 1950 Plan continued to provide health benefits to miners who retired before 1976, but the 1974 Plan was restricted to cover only "orphan" post-1975 retirees, *i.e.*, those whose last employer was no longer in business. All other post-1975 retirees were thereafter to receive benefits from individual coal mine operators' employer plans, which were to be established and financed by the signatory coal mine operators. Pet. App. 32.[1]

In 1988, the United Mine Workers and signatory operators negotiated a new NBCWA containing, for the first time, a withdrawal liability clause. That clause provided that, if a signatory operator ceased to

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[1] The 1978 NBCWA and each successor agreement also contained "guarantee clauses," which provided that "the Employers hereby agree to fully guarantee" the health benefits provided by the 1950 and 1974 Plans. See *McGlothlin* v. *Connors*, 142 F.R.D. 626, 631 (W.D. Va. 1992). In addition, the 1950 and 1974 Plans, which were incorporated by reference into the NBCWAs, contained "evergreen clauses," which required each signatory coal operator who ever made contributions to the Plans to continue to make contributions at the rate specified in the current NBCWA, whether or not the operator signed that agreement. See Pet. App. 58; *United Mine Workers of Am. 1974 Pension* v. *Pittston Co.*, 984 F.2d 469 (D.C. Cir.), cert. denied, 113 S. Ct. 3039 (1993).

have an obligation to contribute to the 1950 and 1974 Plans, the operator had to pay a specified withdrawal liability to each plan. Pet. App. 3, 53-54. Although the withdrawal liability clause was intended to insure against the adverse economic consequences to retirees' health benefits of a signatory's withdrawal, the payments required by the clause "represented only five years of contributions to the Plans, not the actual cost of funding lifetime health benefits for a withdrawing employer's retirees." *Id.* at 54.

2. By the late 1980s, the financial stability of the retiree health benefit structure established in the 1978 NBCWA and successor agreements had been seriously undermined by several developments. First, "[s]ome employers successfully contended in the courts that their obligation to provide health benefits ceased with the expiration of the last NBCWA they signed, and that the 1974 Plan became responsible for their retirees' medical benefits." Pet. App. 33; see, *e.g.*, *In re Chateaugay Corp.*, 945 F.2d 1205, 1208-1209 (2d Cir. 1991), cert. denied, 502 U.S. 1093 (1992); *District 29, United Mine Workers* v. *Royal Coal Co.*, 768 F.2d 588 (4th Cir. 1985). Second, escalating health care costs increased the financial burden of providing benefits to the beneficiaries of the Plans. Third, structural changes in the coal industry caused substantial reductions in both the number of mine operators that were signatories to the NBCWAs and the number of active miners employed by signatory operators. As a result, a smaller number of signatory operators and active miners were forced to bear the growing costs of providing benefits to an

increasing number of beneficiaries of the 1950 and 1974 Plans. Pet. App. 32-33.[2]

After a protracted strike against the Pittston Coal Company, in which health benefits were a major issue, and other labor unrest in the bituminous coal industry, the Secretary of Labor appointed a Coal Commission to make recommendations about the future of funding for retirees' health benefits. After the Coal Commission issued its report, Congress held hearings to consider the Commission's findings and recommendations. Pet. App. 34-35. Those hearings led to enactment of the Coal Act.

In the Coal Act, Congress sought to "provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, Subtit. C, § 19142(b)(3), 106 Stat. 3037. Congress also found that the existing private health care benefit plan structure for coal miner retirees should be modified to "identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." § 19142(a)(2), 106 Stat. 3037.

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[2] By 1990, only 25% of the beneficiaries under the 1950 and 1974 Plans were retirees of NBCWA signatories that were still contributing to the Plans. Approximately 60% of the beneficiaries were "orphans" whose former employers were no longer in business, and about 15% had last worked for mine operators that were still in business but no longer contributing to the Plans. See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Finance Comm.*, 102d Cong., 1st Sess. 44-45 (1991) (testimony of Michael K. Reilly, Chairman, Bituminous Coal Operators Association).

The Coal Act addresses two separate, but related, problems in financing benefits for coal industry retirees. First, it ensures future funding for benefits under individual employers' plans, such as petitioners' plans established pursuant to the 1988 NBCWA, by requiring the last signatory employer of retirees receiving benefits under those plans to continue to provide health benefits to those retirees for as long as the signatory operator, or any related person, remains in business. 26 U.S.C. 9711(a). Second, the Coal Act broadly addresses the crisis in funding of benefits under the 1950 and 1974 multiemployer plans by requiring all signatories to the 1988 NBCWA to bear the cost of providing benefits to their own retirees and to share in the overall cost of providing benefits to "orphans" whose former employers are no longer in business. See 26 U.S.C. 9712(d)(1).

To the latter end, the Act required the merger, as of February 1, 1993 (the last day the 1988 NBCWA was in effect), of the 1950 and 1974 Plans into the new United Mine Workers of America Combined Benefit Fund (Combined Fund), a statutorily created private trust fund providing health care benefits to persons who were receiving benefits from the 1950 and 1974 Plans. 26 U.S.C. 9702(a), 9703(e). The Act also directed the Secretary of Health and Human Services to match the Combined Fund beneficiaries with operators that employed them. 26 U.S.C. 9706(a).[3]

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[3] The responsibilities of the Secretary of Health and Human Services under the Coal Act have since been transferred to the Commissioner of Social Security. See Social Security Independence and Program Improvements Act of

After completion of the match, each operator must pay an annual premium to the Combined Fund, equal to the cost of providing benefits to its own assigned beneficiaries and its *pro rata* share of all the unassigned, or "orphan," beneficiaries. 26 U.S.C. 9704(a), (b), and (d). Because the matching process could not be completed at once, the Coal Act provided that, during the first plan "year" (the eight-month period beginning February 1, 1993), the cost of administering and paying benefits from the Combined Fund would be paid by all the operators who, like petitioners, signed the 1988 multi-employer collective bargaining agreement. 26 U.S.C. 9704 (i)(1)(A).[4]

3. Petitioners are coal operators that signed the 1988 NBCWA and prior national collective bargaining agreements. During the term of the 1988 NBCWA, petitioners ceased covered operations and withdrew from the 1950 and 1974 Plans. Petitioner Barrick Gold Exploration, Inc., ceased covered operations in October 1988, and petitioner Creighton Hills Coal Co. ceased covered operations in March 1992. See Pet. 14-

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1994, Pub. L. No. 103-296, §§ 105(a)(2)(A), 108(h)(9)(A), 108 Stat. 1472, 1487-1488.

[4] The Act also establishes another multi-employer plan, the United Mine Workers of America 1992 Benefit Plan, as a safety net to provide health benefits to persons who should receive coverage under an individual employer plan but do not. See 26 U.S.C. 9712(b)(2). Every operator who signed the 1988 NBCWA must pay an annual premium and provide security to the 1992 Benefit Plan to cover the estimated cost of providing the benefits attributable to that operator. 26 U.S.C. 9712(d)(1)(A) and (C). Operators must also pay a monthly premium for each of their beneficiaries who actually receives benefits from the 1992 Benefit Plan. 26 U.S.C. 9712(d)(1)(B) and (3).

15. Upon terminating their participation in the 1950 and 1974 Plans, petitioners became obligated to make the contractual withdrawal liability payments specified in the 1988 NBCWA, which were made.

As signatories of the 1988 NBCWA, petitioners are subject to the funding obligations of the Coal Act, including the requirement that they bear part of the cost of administering and paying benefits under the Combined Fund, the successor to the 1950 and 1974 Plans. Petitioners brought suit for declaratory and injunctive relief in 1993, asserting a variety of constitutional objections to the operation of the Coal Act. Over the course of the litigation, petitioners abandoned all but one of their original constitutional claims. They now claim only that the Act as applied to them violates the substantive component of the Due Process Clause of the Fifth Amendment, because it obligates them to participate in the funding of the Combined Fund without providing an offsetting "credit" for the amounts they paid to satisfy their contractual withdrawal liability under the 1988 NBCWA to the Combined Fund's predecessors.

After consolidating preliminary injunction proceedings with a trial on the merits, the district court entered judgment for respondents. Pet. App. 28-75. The district court rejected all of petitioners' constitutional claims, including their due process claim based on the Act's failure to credit their withdrawal liability payments. The district court concluded that "Congress rationally found that the practice of operators withdrawing from the industry or otherwise terminating their obligation under the NBCWA * * * substantially contributed to the underfunding problems experienced by [the 1974] Plan" and that "[t]hese problems were not adequately addressed

by the contractual withdrawal liability payments required under the NBCWA." *Id.* at 54-55.

The court of appeals affirmed. Pet. App. 1-27. The court acknowledged that the Due Process Clause "has a substantive component as well as a procedural one," and that substantive due process "clearly remains viable in the [Supreme] Court's thinking today." *Id.* at 6 n.4. The court further observed, however, that modern substantive due process review of social and economic legislation is highly deferential, even when that legislation "upsets otherwise settled expectations" or "impose[s] a new duty or liability based on past acts." *Id.* at 14-15. Applying a deferential standard of review, the court found no reason why Congress was constitutionally obligated to credit petitioners for their contractual withdrawal liability payments, and it found this case similar to others in which this Court upheld "requirement[s] * * * that companies withdrawing from multiemployer pension plans make payments to reduce the unfunded vested liabilities of the plans." *Id.* at 18.

## ARGUMENT

Petitioners renew their contention that the Coal Act violates substantive due process because it requires operators that signed the 1988 NBCWA and made withdrawal liability payments to the 1950 and 1974 Plans under that agreement to share in the financing of the Combined Fund, the Plans' successor, without receiving any credit for the earlier withdrawal liability payments. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or

any other court of appeals. Further review is therefore unwarranted.[5]

1. "In passing the Coal Act, Congress removed the subject of health benefits for * * * retirees from the collective bargaining process and dealt with it legislatively instead." Pet. App. 7. That legislation "come[s] to the Court with a presumption of constitutionality, and * * * the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As long as a "statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Turner Elkhorn*, 428 U.S. at 15-16. Moreover, "there is no need for mathematical precision in the fit between justification and means" chosen by the legislature. *Concrete Pipe & Prods. of California, Inc.* v.

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[5] Petitioners urge the Court to grant certiorari to decide whether the Due Process Clause imposes substantive, as well as procedural, limitations on government action. Pet. i, 20-26. That issue does not require this Court's review; the Court recently reiterated that the Due Process Clause contains a "substantive component * * * that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.' " *Collins* v. *City of Harker Heights*, 503 U.S. 115, 125 (1992). The court of appeals also recognized that "[t]he concept of substantive due process clearly remains viable" and that "courts may invalidate legislation that deprives persons of life, liberty, or property on a basis found to be arbitrary and irrational." Pet. App. 6 n.4.

*Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2288 (1993). Applying those deferential standards to the Coal Act, the court of appeals was plainly correct in holding that the Act does not violate petitioners' substantive due process rights.

2. Petitioners' due process claim has three related themes. First, they contend (Pet. 26-27) that their contractual withdrawal liability payments, which ended their contractual obligations to the 1950 and 1974 Plans under the 1988 NBCWA, rendered them constitutionally exempt from the imposition of new statutory funding obligations under the Coal Act. Second, they argue (Pet. 29-32) that, even if Congress had the constitutional authority to include them in the Coal Act's funding obligations, Congress was constitutionally required to give them an offsetting credit for the contractual withdrawal payments they made before the Act took effect. Third, they contend (Pet. 27-28, 33-35) that the Coal Act did give a credit to the 97% of 1988 NBCWA signatories that did not incur contractual withdrawal liability before enactment of the Act, and that the Act's failure to provide them with a comparable credit is irrational.

a. With respect to the first of those objections, petitioners complain that the Coal Act denied them the benefit of their contractual bargain under the 1988 NBCWA by imposing obligations beyond those that they contracted to assume. See Pet. 37. But even assuming that is true as a factual matter, it does not establish a constitutional violation under the Due Process Clause. The Due Process Clause does not prohibit Congress from imposing legal and financial obligations on employers beyond those voluntarily assumed by contract. To the contrary, Congress may override private contractual limits on liability, and it

may even do so retroactively, as long as it has a rational basis for doing so.

This Court's decisions in *Gray* and *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), are illustrative. *Gray* and *Connolly* addressed constitutional challenges to the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208 (codified at 29 U.S.C. 1381-1461 (1988 & Supp. V 1993)), which retroactively imposed statutory withdrawal liability on employers that had withdrawn from multi-employer pension plans prior to the statute's enactment. In both cases, affected employers contended that the MPPAA was unconstitutional because, *inter alia*, it retroactively imposed financial obligations beyond those they had assumed by contract, thereby defeating their settled contractual expectations.

This Court held that the retroactive expansion of financial liability beyond the terms of the parties' contracts did not offend either the Due Process Clause (*Gray*) or the Just Compensation Clause (*Connolly*) of the Fifth Amendment.[6] In *Gray*, the Court explained that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," and that "[t]his is true even though the effect of the legislation is to impose a new duty or liability based on past acts." 467 U.S. at 729-730. Similarly, in *Connolly*, the Court explained that "[i]f the regulatory statute is otherwise within the powers of Congress, * * * its application may not be defeated by private contractual

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[6] Petitioners in this case also challenged the Coal Act below under the Just Compensation Clause, Pet. App. 24-27, but they have abandoned that claim in this Court.

provisions." 475 U.S. at 224. Those decisions foreclose any argument that petitioners' contractual obligations under the 1988 NBCWA marked the constitutional outer limit of Congress's powers.

b. Petitioners next argue that, even if Congress may subject them to the Coal Act's funding obligations, it may not do so unless it also provides them with a "refund, credit, or offset" (Pet. 27) for the sums they paid as contractual withdrawal liability under the 1988 NBCWA. That claim, in essence, is simply a complaint that the Coal Act is less fair, as applied to petitioners, than it would have been had petitioners been granted an offsetting credit. But the Constitution does not place the courts in the general role of second-guessing the substantive fairness of economic legislation like the Coal Act. See, *e.g.*, *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). In choosing a scheme to remedy the complex financial problems besetting the retired miners' health benefits system, Congress had to reconcile many concerns and had to choose from among a wide variety of options for allocating the costs of medical care for coal industry retirees. "[W]hether a broader [or narrower] cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Turner Elkhorn*, 428 U.S. at 19.

Petitioners assert (Pet. 31) that, because they made contractual withdrawal liability payments, it was not "rational to treat the employees' expectation of benefits * * * as [their] responsibility," at least in the absence of offsetting credits. But petitioners were "responsible" for retirees' benefits under the 1950 and 1974 Plans, for they contributed to those plans under the various NBCWAs to which they were

signatories, and, as the district court pointed out (Pet. App. 54), the contractual withdrawal payments made by petitioners represented only five years of contributions to the Plans, not the actual cost of funding lifetime health benefits for a withdrawing employer's retirees. Petitioners' withdrawal thus contributed to the coal industry's medical care funding problems, even after their withdrawal liability payments are taken into account. Congress's decision to require petitioners to contribute to the amelioration of the Plans' funding crisis was therefore constitutional, for "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

c. Finally, petitioners maintain (Pet. 27-28, 33-35) that Congress granted other 1988 NBCWA signatories that did not withdraw from the Plans the same credit that it withheld from petitioners. That contention is incorrect. Petitioners assert that a credit to nonwithdrawing signatories was "effectively" created (Pet. 28, 33) by 26 U.S.C. 9702(a)(2), which provides that the Coal Act's statutory merger of the 1950 and 1974 Plans into the Combined Fund shall not be treated as an employer withdrawal for purposes of the 1988 NBCWA. That provision did not grant anyone a credit; instead, it ensured that 1988 signatories that had not terminated their participation in the Plans were not subjected to unintended contractual withdrawal liability because of a technical change (the statutory conversion of the 1950 and 1974 Funds into the Combined Fund) over which they had no control.

Petitioners also overlook the fact that other signatories incurred costs that petitioners avoided by withdrawing from the 1950 and 1974 Plans. The other signatories continued to pay monthly contributions to the 1950 and 1974 Plans throughout the full term of the 1988 agreement until the Coal Act took effect. Moreover, those signatories had to increase their contributions to comply with preliminary injunctions issued in litigation over the Plans. See, *e.g.*, *McGlothlin* v. *Connors*, 142 F.R.D. 626, 647 (W.D. Va. 1992). Thus, even if the financial obligations imposed on petitioners by the Coal Act were different than those imposed on non-withdrawing operators, Congress had a rational basis for drawing such a distinction.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1995

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No. 94-1938

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OCTOBER TERM, 1995

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BARRICK GOLD EXPLORATION, INC., and
CREIGHTON HILLS COAL CO., INC.,
*Petitioners*

v.

MARTY D. HUDSON, *et al.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR THE RESPONDENT TRUSTEES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, violates the Due Process Clause of the Fifth Amendment by imposing prospective obligations on petitioners to provide health care to their retired miners and to contribute prefunding premiums to the UMWA 1992 Benefit Plan, notwithstanding certain previous contractual payments made by petitioners in accordance with their voluntarily-assumed obligations under the collective bargaining agreement in effect from February 1, 1988 through February 1, 1993.

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# In the Supreme Court of the United States

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No. 94-1938

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## BRIEF FOR THE RESPONDENT TRUSTEES IN OPPOSITION

---

Respondent Trustees of the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and Trustees of the United Mine Workers of America 1992 Plan ("1992 Plan") (collectively, "Trustees") submit this brief in opposition to the petition for a writ of certiorari in this case.

## STATEMENT OF THE CASE

Following an extensive inquiry in 1990 by the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission") and its own thorough review of the coal industry's collectively-bargained multiemployer retiree health care trusts, Congress passed the Coal Industry Re-

tiree Health Benefit Act of 1992 ("Coal Act" or "Act"), 26 U.S.C. §§ 9701 *et seq.* Through the new statute, Congress sought to resolve the severe financial crisis that threatened the collectively-bargained trusts. For more than 40 years, these multiemployer health benefit plans had provided retiree health care to retired miners and their dependents, in accordance with a series of collective bargaining agreements between the United Mine Workers of America ("UMWA") and various employers in the bituminous coal industry. These agreements are known as the National Bituminous Coal Wage Agreements or "NBCWAs".

The financial crisis, which reached its peak during the decade preceding the Coal Act's passage, jeopardized the continued provision of health care benefits to more than 100,000 retired miners and their dependents. The crisis had several causes. First, as each successive NBCWA expired, numerous employers that had signed the 1978 NBCWA or later NBCWAs and remained in business refused to sign new NBCWAs and refused to continue providing health care to their former employees. Instead, they sought to dump thousands of their retirees into the existing multiemployer health benefit plans, where their health care would be provided by other employers.[1] As a result, the trusts incurred additional liabilities and the remaining NBCWA coal operators had to pay higher contributions to finance coverage for retirees who had been abandoned by their former employers. This created a strong financial incentive for the remaining NBCWA coal opertors to follow suit, thereby further undermining the trusts' financial base. Second, numerous coal industry workers retired from com-

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[1] This kind of dumping of retirees is discussed in *District 29, UMWA v. UMWA 1974 Benefit Plan and Trust*, 826 F.2d 280 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); and *UMWA v. Nobel*, 720 F. Supp. 1169 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991).

panies that went out of business. These "orphan" retirees were considered an industry-wide responsibility that fell on an increasingly small number of employers. Third, several employers negotiated so-called "non-conforming agreements," which purportedly allowed the companies to reduce or discontinue contributions to one or both of the multiemployer health benefit plans. Although these agreements now have been held ineffective to relieve these employers of their prior contractual obligations,[2] they nonetheless contributed to the financial strain on the multiemployer plans. Finally, the cost of providing health benefits increased dramatically, and that increase significantly affected the UMWA health plans' annual expenses.

The uncertainty of continued health benefits for active and retired UMWA miners led to substantial labor strife in the nation's bituminous coal mining regions. One of the most serious of these labor disputes, a ten-month strike by the UMWA against the Pittston Coal Company, was settled only after the Secretary of Labor intervened. As part of the settlement, the Secretary established the Coal Commission to analyze the retiree health care crisis and recommend a solution.

In November 1990, the Coal Commission submitted its findings and recommendations. In its report, the Coal Commission stated that ensuring the continued provision of health benefits to UMWA retirees and their dependents should be the primary objective of any proposed solution. The Commission also recognized that the collective bargaining process was inadequate to provide a long-term solution to the health care crisis. Accordingly, the Commission urged that Congress adopt a legislative solution to the crisis.

Following the Coal Commission's report, Congress undertook its own intensive two-year examination of the sub-

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[2] *See UMWA 1974 Pension Trust v. Pittston Co.*, 948 F.2d 469 (D.C. Cir.), *cert. denied*, 113 S. Ct. 3039, 3040 (1993).

ject. The Coal Act was the final product of those deliberations. In enacting the Coal Act, Congress found that:

> it is necessary to modify the private health care benefit plan structures for retirees in the coal industry to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees.

106 Stat. 3037, *see* 26 U.S.C. § 9701 (historical note). Congress further stated that the policy of the Coal Act is:

> to remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to retirees in the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans.

*Id.*

In the Coal Act, Congress created two new trust funds for the provision of health care benefits to retired miners and their dependents. The Combined Fund, into which the two pre-existing collectively-bargained multiemployer health care trusts were merged, is designed to continue health care coverage for the beneficiaries of the pre-existing trusts. *See* 26 U.S.C. §§ 9702(a)(2), 9703(a), (b), (f). The second new fund, the 1992 Plan, is an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage directly from their former employers. *See* 26 U.S.C. § 9712(a), (b). In addition, the Coal Act required companies that were providing retiree health benefits through an individual employer plan pursuant to the NBCWAs to continue providing benefits to the plan's current beneficiaries. *See* 26 U.S.C. § 9711.

Two basic policy decisions are reflected in the Coal Act. First, Congress decided to solve the retiree health

care crisis on a prospective "going forward" basis, outside the ambit of the collective bargaining process. To accomplish this "fresh start," Congress provided a specific date —February 1, 1993, the termination date of the 1988 NBCWA—on which the old collectively-bargained system would be replaced entirely by the statutory system. *See e.g.*, 26 U.S.C. § 9702(a)(2).[3] For the period prior to February 1, 1993, the Coal Act left existing contractual obligations unaffected. The statute explicitly provided that all pre-February 1, 1993 obligations to the health care trusts under the NBCWAs would be governed exclusively by the collective bargaining agreements. *See* 26 U.S.C. § 9708. Congress recognized, however, that the 1988 NBCWA provided for contractual withdrawal liability payments from employers that, for any reason, ceased to have an obligation to contribute to the health care trusts. At the same time Congress was committed to the proposition that liability to the Combined Fund arising *on or after* February 1, 1993 would be governed exclusively by the Coal Act. Congress therefore expressly provided that the statutory merger of the pre-existing trusts into the Combined Fund "shall not be treated as an employer withdrawal for purposes of any 1988 coal wage agreement." 26 U.S.C. § 9702(a)(2).

Second, Congress decided that "those companies which employed the retirees in question, and thereby benefitted from their services, will be assigned responsibility for providing the health care benefits promised in their various collective bargaining agreements." 138 Cong. Rec. S17603 (daily ed. Oct. 8, 1992) (reproducing proposed conference committee report). The Coal Act implements this "pay for your own" policy (i) by requiring companies to continue their own individual employer plans to provide ongoing benefits to their own post-1975 retirees, 26 U.S.C.

[3] All issues concerning the provision of health care benefits to retirees becoming eligible for retirement *after* February 1, 1993 were left to the collective bargaining process.

§ 9711; (ii) by "assigning" companies financial responsibility for their own retirees in the Combined Fund, 26 U.S.C. §§ 9704, 9706; and (iii) by requiring any existing companies whose retirees receive benefits from the 1992 Plan to pay to the Plan a per beneficiary premium sufficient to cover the health care costs of such retirees, 26 U.S.C. § 9712.

Petitioners were signatory to the national collective bargaining agreement in effect when the Coal Act was enacted, the 1988 NBCWA. Under the Coal Act, petitioners have three principal obligations: (1) as 1988 NBCWA signatory operators, they were required to make interim contributions to the Combined Fund to help finance the first eight months of the Combined Fund's operations, from February through September 1993 (*see* 26 U.S.C. § 9704(i)(1)(A)); (2) as 1988 NBCWA signatory operators that were each contractually obligated to maintain an individual company health plan through February 1, 1993, they are required to continue the plans in effect after February 1, 1993, for the benefit of their own retirees and their dependents (*see* 26 U.S.C. § 9711); and (3) also as 1988 NBCWA signatory operators, they are required to pay annual prefunding premiums to the 1992 Plan based on the number of beneficiaries in their individual company plans (all of whom could become beneficiaries of the 1992 Plan should petitioners not provide their health care directly through the individual company plans) (*see* 26 U.S.C. § 9712(d)).

On January 29, 1993, three days before the Combined Fund and 1992 Plan were to begin providing benefits, petitioners, together with two other companies, filed this action against the Trustees of the Combined Fund and Trustees of the 1992 Plan. Petitioners alleged that the Coal Act violated the Due Process and Takings Clauses of the Fifth Amendment. Initially, petitioners focused their objections on their obligations to make interim contributions to the Combined Fund under Section 9704(i)

(1)(A) of the Coal Act. In this Court, however, they have abandoned that position. Pet. 16 n.1. Petitioners now focus on their obligations to maintain their individual company health plans under Section 9711 and to pay annual prefunding premiums to the 1992 Plan under Section 9712. With respect to those obligations, they now make the same arguments that they previously made with respect to the Combined Fund. They contend that somehow they should be relieved of their Coal Act obligations because, in accordance with their voluntarily undertaken obligations under the 1988 NBCWA, they paid contractual withdrawal liability to the collectively-bargained multiemployer health trusts when they permanently ceased mining operations during the term of the 1988 NBCWA, before the Coal Act was enacted. They maintain that, because the Coal Act does not authorize them to offset, reduce, or eliminate their statutory obligations by virtue of their prior contractual payments, the Act is unconstitutional.

The facts concerning petitioners' contractual withdrawal liability payments are not in dispute. Petitioners voluntarily agreed to be bound by the terms of various NBCWAs to obtain the benefits associated with those agreements, including in particular the labor of UMWA-represented miners. Among the obligations to which petitioners agreed in 1988 were the "contractual withdrawal liability" provisions of the 1988 NBCWA, which required each signatory employer, if it ceased, for whatever reason, to have an obligation to contribute to the multiemployer health care trusts, to make a lump-sum payment to the affected trusts in an amount essentially equal to the employer's contributions to the trusts during the preceding five years.[4]

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[4] The contractual withdrawal liability provisions attempted to ensure that, if an employer sought to withdraw and thus to "dump" its health care costs on other signatory employers, it would make at least some payment to reduce the financial burden it was leaving behind.

Due to their own decisions and actions, petitioners permanently ceased NBCWA-covered operations *during the term of the 1988 NBCWA*, and thus incurred contractual withdrawal liability. The contractual withdrawal liability payments to which petitioners had agreed in the 1988 NBCWA became due and owing before the Coal Act was passed and without regard to any provision in the statute.

In June 1993, the district court ruled that the Coal Act did not violate the Due Process Clause, and granted summary judgment for the respondent Trustees and for the United States, which had intervened as a defendant to defend the validity of the statute. In particular, after reviewing the well-settled standards for judging petitioners' various due process claims (Pet. App. 41-43), the district court rejected petitioners' argument that the Coal Act is arbitrary and irrational because it does not provide a credit for petitioners' prior contractual payments. As the district court explained:

> Plaintiffs contractually agreed to be bound by the withdrawal liability provisions when they signed the 1988 NBCWA. . . .
>
> * * *
>
> Congress rationally found that the practice of operators withdrawing from the industry or otherwise terminating their obligation under the NBCWA, resulting in the transfer of their employees to the 1974 Plan, substantially contributed to the underfunding problems experienced by that Plan. . . . Congress did not act irrationally in preserving the withdrawal liability provision in the NBCWA or in failing to provide for a refund of withdrawal liability payments.

Pet. App. 53-55.

The court of appeals affirmed. The court observed that petitioners' contractual withdrawal liability payments "were not mandated by the Coal Act at all" but by petitioners' own collective bargaining agreements. Pet. App. 19. Noting that petitioners "do not directly contend that Congress

acted unconstitutionally in imposing" statutory obligations on them, the court remarked that petitioners essentially were asking the court to analyze "the rationality of not including in a legislative enactment every provision that might rationally have been included." Pet. App. 9, 19. As the court said, "[t]he number of rational provisions that might conceivably have been added to the Coal Act to ameliorate the burden on the plaintiffs or other employers would appear to be limited only by the ingenuity of counsel." Pet. App. 19. The court found no basis for petitioners' claim of a due process violation.[5]

## ARGUMENT

The court of appeals' decision is correct, and further review is not warranted.

### I. THE CASE PRESENTS NO UNRESOLVED OR CONTROVERSIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW

There is simply no unresolved or controversial question of federal constitutional law presented here. Consideration of the issues raised by petitioners in their petition for a writ of certiorari will not resolve any important question of federal law that has not already been settled by this Court.

First, the lower courts have uniformly upheld the Coal Act against claims that it violates the Due Process Clause. During the past two years, due process challenges to the Coal Act have been asserted in a number of cases. These cases have presented diverse fact patterns and focused on various specific provisions of the Act. As petitioners concede (Pet. 21-22 n.2), every court that has reviewed a due process challenge to the Coal Act, including two courts of appeals and several district courts, has found

[5] In the courts below, petitioners also raised a Takings Clause challenge to the Coal Act. They have not pursued this portion of their case in this Court.

that the Coal Act satisfies the requirements of the Due Process Clause. *See*, in addition to the decision below, *LTV Steel Company, Inc. v. Shalala*, 1995 WL 226252 (2d Cir. April 17, 1995), *aff'g*, 154 B.R. 416 (S.D.N.Y. 1993) and 163 B.R. 955 (S.D.N.Y. 1993), *cert. pending on other grounds*, No. 94-6024 (filed July 14, 1995); *Blue Diamond Coal Co. v. Shalala*, 174 B.R. 722 (E.D. Tenn. 1994), *appeal pending*, No. 94-6539 (6th Cir.); *Holland v. Keenan Trucking Co.*, No. 2:93-1223, Mem. Op. (S.D. W. Va. March 15, 1995); *Templeton Coal Co. v. Shalala*, 882 F. Supp. 799 (S.D. Ind. 1995), *appeal pending*, No. 95-2306 (7th Cir.); *Davon, Inc. v. Shalala*, No. TH 93-1980C-T/H, Entry Regarding Defendant's Motion to Transfer Venue and the Parties' Cross-Motions for Summary Judgment (S.D. Ind. April 4, 1995), *appeal pending*, No. 95-1960 (7th Cir.); *Holland v. High-Tech Collieries, Inc.*, No. 93-0158-C, bench ruling (N.D. W. Va. March 28, 1995); *Unity Real Estate Co. v. Hudson*, 1995 WL 373281 (W.D. Pa. June 7, 1995) (granting motion for preliminary injunction on Takings Clause grounds but rejecting due process arguments).

Second, the Coal Act issue presented by petitioners involves only one specific application of a comprehensive statutory scheme designed to protect the health care benefits of retired miners and their dependents. As the court of appeals noted, petitioners do not "directly contend that Congress acted unconstitutionally in imposing" obligations on it. Pet. App. 9. Although petitioners assert that "the Court of Appeals misconstrued their assertions" because they "never acknowledged that Congress rationally imposed the Coal Act's burdens on them in the first instance" (Pet. 33-34 n.6), the fact is that petitioners' only complaint is that Congress failed to properly weigh certain facts concerning their payment of contractual withdrawal liability under the 1988 NBCWA. Only petitioners are challenging the Coal Act's constitutionality on this ground and, accordingly, this case does not have the broad significance that petitioners claim.

In apparent recognition of the insignificance of their specific Coal Act challenges, petitioners' Question Presented does not directly seek review of these contentions. Instead, petitioners attempt to create a generic issue by suggesting that the Court grant review to decide whether the Due Process Clause guarantees any substantive rights. Pet. 21. But the answer to this question cannot possibly help petitioners. If the answer is negative, petitioners' due process challenge fails automatically, and no further inquiry is needed. If the answer is positive, the Coal Act is to be reviewed under the "arbitrary or irrational" standard set forth in this Court's decisions and correctly applied by the court of appeals. In that event, petitioners' due process challenge would be rejected for the very reasons set forth by the courts below, namely, that it was not arbitrary or irrational for Congress to omit from the Coal Act some special dispensation for 1988 NBCWA signatories that paid contractual withdrawal liability. Petitioners' Question Presented attempts to assume away the *real* issue in the case, by asserting as if it were a given that the Coal Act is arbitrary and irrational as applied to petitioners. That, however, is the very issue that was actually litigated below and properly resolved against petitioners by two courts, both of which proceeded from the premise that the Due Process Clause protects persons against arbitrary and irrational economic legislation. *See* Pet. App. 14-17 and 41-43. There is no occasion for this Court to grant review to resolve a question that not only has already been settled by earlier decisions but that would not help petitioners even if it were decided in their favor.

Nor is there any need to review this case in order to clarify the applicable standards for evaluating due process challenges. As petitioners concede, and as the lower courts noted (Pet. App. 14 and 41), the "standards for evaluating due process claims are well settled." Pet. 22. Just two years ago, in a portion of the *Concrete*

*Pipe* opinion joined by every member of the Court (*see Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, —— U.S. ——, 113 S. Ct. 2264, 2286-89 (1993)), the Court summarized and applied those well-known rules. Nowhere in their petition do petitioners suggest that the courts below misunderstood or misapplied these standards. Instead, petitioners essentially request that the Court change the settled standards, which petitioners describe as "nominal," in order to discover a substantive due process violation in this case. Pet. 22. The problem, however, is not with the standards but rather with petitioners' perception of the "arbitrary and irrational test" as "stringent." Pet. 35.

As shown in the following section, the court of appeals correctly applied the governing law in concluding that the Coal Act does not violate the Due Process Clause and that Congress is not constitutionally required to provide that petitioners could use their contractual withdrawal payments, which were voluntarily made pursuant to a private contract, to reduce or eliminate their Coal Act obligations.

## II. THE COURT OF APPEALS CORRECTLY RULED THAT THE COAL ACT IS NEITHER ARBITRARY NOR IRRATIONAL AND DOES NOT VIOLATE PETITIONERS' FIFTH AMENDMENT DUE PROCESS RIGHTS

Petitioners' only complaint is that Congress failed to properly weigh certain facts concerning their pre-existing contractual obligations under the NBCWAs. Specifically, petitioners claim that the "particular manner" in which Congress imposed Coal Act obligations, *i.e.*, without providing refunds based on previous contractual withdrawal liability payments, does not rationally further any legislative objective. Pet. 33. As the court of appeals noted (Pet. App. 9), petitioners' claim is that "Congress was

constitutionally required to provide for a refund, credit, or offset in respect of any contractual withdrawal liability payments made to the multi-employer plans under the 1988 agreement." Pet. App. 9.

The Due Process Clause, however, requires neither an offset nor a refund of contractual withdrawal liability payments to reduce or eliminate petitioners' Coal Act obligations. As the court below recognized:

> It is important to remember, in this connection, that the big-ticket expenditures for which the plaintiffs would like to receive credit—the contractual withdrawal liability payments under the 1988 agreement —were not mandated by the Coal Act at all. It would doubtless have been rational for Congress to have decided that employers should receive a credit for such voluntarily-incurred obligations, but we would be taking on quite a task if we began analyzing the rationality of not including in a legislative enactment every provision that might rationally have been included.
>
> The number of rational provisions that might conceivably have been added to the Coal Act to ameliorate the burden on the plaintiffs or other employers would appear to be limited only by the ingenuity of counsel. Must each omission be justified as rational? Must Congress, in other words, have a rational basis for failing to act? We doubt it. . . .

Pet. App. 19.

As they must, petitioners concede that, consistent with the Due Process Clause, "Congress can upset settled expectations and impose burdens disproportionately so long as it has a rational basis for the choices it makes." Pet. 32. As this Court has held, "mathematical precision in the fit between justification and means" of legislation is not required. *Concrete Pipe*, 113 S. Ct. at 2288. Further, Congress has "absolutely no obligation to select the scheme that a court later would find to be

the fairest, but simply one that was rational and not arbitrary." *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1955).[6] Moreover, "the law need not be in every respect logically consistent with its aims to be constitutional," *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955), and legislative "line drawing" does not violate substantive due process even if "some persons who have almost equally strong claims to particular treatment are placed on different sides of the line." *United States v. Lee*, 957 F.2d 778, 782 (10th Cir.), *cert. denied*, 113 S. Ct. 475 (1992).

In any event, it was plainly logical for Congress to decide that prior NBCWA payments, including contractual withdrawal liability payments, should not be a basis for reducing or eliminating Coal Act obligations. Consistent with the Coal Commission's recommendations, Congress determined that the crisis facing the health benefit trust should be addressed on a "going forward" basis that did not attempt to readjust the NBCWAs' division of rights and liabilities.[7] Congress decided, in other words, that

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[6] *See also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (the "Due Process Clause does not empower the judiciary to 'sit as a superlegislature to weigh the wisdom of legislation' "); *Carolene Products Co. v. United States*, 323 U.S. 18, 29 (1944) (where the court finds that Congress had power to decide its own course in enacting legislation, the court need look no further).

[7] This determination is expressed in numerous provisions of the Coal Act. For example, Congress established a specific date on which the pre-existing funds would be merged into the Combined Fund. 26 U.S.C. § 9702(a)(2). It also provided that any deficit the prior funds had as of that date would be the sole responsibility of the 1988 NBCWA coal operators. 26 U.S.C. § 9704(i)(1)(B). The "fresh start" decision is also evidenced by the fact that, apart from the retirees specifically covered by the statute, Congress elected to leave decisions concerning other coal industry retirees to the collective bargaining process.

in allocating responsibility for the cost of retiree health care under the Coal Act, it would not seek to evaluate the inevitable special pleadings from individual 1988 signatories that, because of their allegedly unique experiences under the 1988 NBCWA, they should be entitled to some unusual relief from the new statutory plan. Instead, the Coal Act is uniform in that no employer is allowed to use its pre-Act payments to the multiemployer retiree health care trusts to reduce or eliminate its Coal Act obligations.

In light of the Coal Act's prospective approach, it was entirely rational for Congress to decide that *no* prior NBCWA payment could be used to reduce or eliminate Coal Act liabilities. Such "rough justice" clearly satisfies the rationality requirement of the Due Process Clause. Congress simply is not constitutionally required to engage in precise calibration of statutory obligations and pre-existing contractual liabilities.

Contrary to the impression that may have been created by petitioners (*see, e.g.*, Pet. 17-18 and 34), Congress did not single out withdrawal liability payments and decide that they alone would not be credited against Coal Act obligations. Nor are petitioners correct in their repeated assertions that the Coal Act gave "a credit to over ninety-seven percent of the other 1988 NBCWA signatories by expressly insulating them from the very same contractual withdrawal liabiiity" that petitioners had paid. Pet. 18, 28. The Coal Act merely provided that the merger of the pre-existing collectively-bargained health care trusts into the Combined Fund on February 1, 1993 would not be deemed to be an event triggering contractual withdrawal liability.[8]

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[8] Under the 1988 NBCWA, the trigger for withdrawal liability was in the control of each contracting employer. So long as an employer continued to make contributions to the health benefit trusts, it had not withdrawn. The 1988 NBCWA did not specifically discuss whether and to what extent liability would attach if the pay-

Similarly, petitioners are wrong on two fronts in arguing that the Coal Act "imposed a variety of burdens on the Companies which wholly deprived them of the benefits they were to receive from" their "pre-enactment" contractual withdrawal payments. Pet. 27.

First, there was no contractual assurance in the 1988 NBCWA that, after the termination of that agreement on February 1, 1993, petitioners could dump their own retirees from their individual company plans into one of the health benefit trusts to obtain benefits paid for by other employers. The 1988 NBCWA, like all the NBCWAs before it, was silent on the question of whether future collective bargaining agreements would provide for the continued existence of the health benefit trusts or even whether there would be future collective bargaining agreements at all. Petitioners' payment of contractual withdrawal liability under the 1988 NBCWA did not in any sense confer on them a right to dump their retirees into the health care trusts after February 1, 1993.

Second, petitioners incorrectly portray the contractual withdrawal liability provisions in the 1988 NBCWA as a substitute for, or an alternative to, continued participation in the multiemployer health benefit trust. The collective bargaining agreement did not provide for contractual withdrawal liability as an escape hatch for employers that decided they would rather not continue to contribute to the multiemployer trusts. Rather, the provisions were intended to provide a disincentive to withdrawal, together with at least a partial protection for the

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ment obligation was terminated not by a company's decision to cease operations, but rather by an external decision to merge the trusts into another entity (*i.e.*, by a situation in which no contributions were due to the trusts because they ceased to exist). To avoid any argument that companies that continued to operate under an NBCWA somehow "withdrew" because Congress eliminated the health benefit trusts, the Coal Act explicitly provided that the statutory merger would not be deemed to trigger any obligation to pay withdrawal liability.

trusts' financial stability in the event that withdrawals nevertheless occurred.

Finally, even if petitioners' characterization of the contractual withdrawal liability provisions were accurate, it still would not affect the validity of the Coal Act. This Court's precedents show that Congress properly could decide to remove the financing of health care for the trusts' beneficiaries from the collective bargaining process, even if doing so upset petitioners' contractual expectations. As the Court stated in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976):

> our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or obligation based on past acts.

*See also Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

There is nothing constitutionally significant about petitioners' payment of contractual withdrawal liability under the 1988 NBCWA. Petitioners voluntarily became bound by the 1988 NBCWA and agreed to pay contractual withdrawal liability if certain conditions were met. Petitioners cannot now shift their past contractual obligations to other 1988 NBCWA signatories by claiming a "refund, credit, or offset." Though petitioners would have preferred a program that allowed them to use their prior contractual payments to reduce their Coal Act obligations, Congress' decision to adopt a different system is rational and fully comports with the Due Process Clause. It simply cannot be argued that Congress acted arbitrarily in deciding that, over the long term, Coal Act obligations should not be based on the amount, nature, or timing of prior contractual payments to the health care trusts.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 94-1938

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARRICK GOLD EXPLORATION, INCORPORATED, et al.

*Petitioners,*

*v.*

MARTY D. HUDSON, *et al.*

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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# REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law which has not been, but should be, settled by this Court. As set forth in the Petition for Writ of Certiorari, if the Due Process Clause of the Fifth Amendment to the United States Constitution truly provides a substantive right that is

protected by the arbitrary and irrational standard, then the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. Sections 9701 *et seq.* ("Coal Act"), violates that substantive right as applied to Barrick Gold Exploration, Incorporated and Creighton Hills Coal Co., Inc. ("Companies").

The Respondents agree that the Due Process Clause provides a substantive right, but claim that the Coal Act easily survives scrutiny under the arbitrary and irrational standard. The Respondents are correct, however, only if, as Justices Scalia and Thomas submit, the arbitrary and irrational standard is an illusory one since the Due Process Clause provides no substantive rights at all.

This case has been in litigation since early 1993. Nevertheless, the Respondents have yet to identify a *single* legislative purpose that is rationally furthered by Congress' decision to impose the Coal Act on the Companies without a refund, offset, or credit for their unique payment of millions

of dollars in contractual withdrawal liability to the very Benefit Plans that were supplanted by the Coal Act.

The United States simply assumes that since Congress had to choose among a variety of possible cost-spreading schemes, it necessarily had the power to choose this particular scheme. (United States' Brief at 13.) If this is a proper application of the Due Process Clause's arbitrary and irrational standard, however, then Justices Scalia and Thomas correctly state that substantive rights under the Due Process Clause are an oxymoron since every conceivable piece of economic legislation would survive this type of scrutiny.

The Trustees' efforts to identify a rational basis for Congress' action are equally inadequate. The Trustees assert that "it was plainly logical for Congress to decide that prior NBCWA payments, including contractual withdrawal liability payments, should not be a basis for reducing or eliminating Coal Act obligations." (Trustees' Brief at 14.) The Trustees reason that "Congress determined that the crisis facing the

health benefit trust should be addressed on a 'going forward' basis that did not attempt to readjust the NBCWA's division of rights and liabilities." (Trustees' Brief at 14.)

Nevertheless, Congress did readjust certain 1988 NBCWA rights and obligations when it selectively protected over ninety-seven percent of the 1988 NBCWA signatories from the very contractual withdrawal liability the Companies paid. Congress expressly provided that the merger of the UMWA 1974 and 1950 Benefit Plans into the Combined Benefit Fund would not constitute a withdrawal for purposes of any 1988 NBCWA. *See* 26 U.S.C. Section 9702(a)(2). While the Trustees claim it is not clear whether this merger would have been a basis for collecting such withdrawal liability,[1] they acknowledge that Congress added this proviso

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[1] The Trustees' equivocation is surprising given that under the terms of the 1988 NBCWA, contractual withdrawal liability arose if, *"for whatever reason,"* an employer ceased to have an obligation to contribute to the UMWA 1950 or 1974 Benefit Trusts, and this liability arose *"whether Withdrawal is caused by a cessation of covered operations by the*

"[t]o avoid any argument that Companies that continued to operate under an NBCWA somehow 'withdrew' . . . [by] explicitly provid[ing] that the statutory merger would not be deemed to trigger any obligation to pay withdrawal liability." (Trustees' Brief at 15-16, n.8.) Thus, by acknowledging that Congress did protect over ninety-seven percent of the 1988 NBCWA signatories from a contingent contractual liability under the 1988 NBCWA by removing any possibility that contractual withdrawal liability claims could be asserted against them, the Trustees concede that Congress did readjust certain NBCWA rights and liabilities.

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*Employer, the Employer's bankruptcy, failure of the Employer to execute a successor Agreement following the expiration of this or any successor Agreement, or for any other reason."* (Emphasis added.) Although the 1988 NBCWA did not specifically discuss whether and to what extent liability would attach if the obligation to contribute was terminated by an external decision to merge the Trusts into another entity, the foregoing language easily can be read as imposing liability under those circumstances since it is expansive and open-ended rather than limiting and confined.

Moreover, the Trustees fail to identify any rational basis for Congress' selection of this ninety-seven percent of the 1988 NBCWA signatories being burdened by the Coal Act for protection against a possible assessment of the very withdrawal liability the remaining three percent already paid or were obligated to pay[2] and none exists. It is arbitrary and irrational in the extreme to protect some 1988 NBCWA signatories from a potential claim for contractual withdrawal liability which, if successfully asserted, would have generated hundreds of millions of dollars for the Benefit Plans allegedly in financial distress, while simultaneously refusing to provide comparable protection to the few 1988 NBCWA signatories that already paid that same contractual withdrawal liability.

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[2] Contractual withdrawal liability claims for withdrawals which occurred prior to February 1, 1993, including one which occurred as late as December, 1992, continued to be asserted and collected well after the Coal Act was passed.

When Congress' collective decisions regarding contractual withdrawal liability are viewed together, *i.e.*, (1) its decision to insure that over ninety-seven percent of the 1988 NBCWA signatories would not be subject to both Coal Act and contractual withdrawal liability claims, even though this potentially deprived the subject Benefit Plans of hundreds of millions of dollars in additional monies, and (2) its corresponding decision to insure that the remaining 1988 NBCWA signatories would be subject to both payment obligations by including them in the Coal Act, but without any offset, refund, or credit for their payments of contractual withdrawal liability, the inescapable conclusion is that these Congressional decisions are wholly arbitrary and irrational. Thus, if the Due Process Clause and its arbitrary and irrational standard provide a substantive right which imposes a meaningful limit on Congressional legislation, then the Coal Act, as applied to the Companies, violates that right.

## CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari itself, the Writ should be granted.

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